

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF SOUTH CAROLINA
3 CHARLESTON DIVISION

4 Suzanne Q. Little, individually
5 and as Personal Representative of
6 the Estate of SAMUEL MARTIN LITTLE,
7 Deceased,

8 Plaintiff(s),

9 vs.

10 CIVIL ACTION NO.
11 2-98-1879-23

12 BROWN & WILLIAMSON TOBACCO
13 CORPORATION, individually and as
14 successor by merger to THE AMERICAN
15 TOBACCO COMPANY, and R.J. REYNOLDS
16 TOBACCO COMPANY,

VOLUME III

17 Defendant(s).

18 VIDEO DEPOSITION
19 DUCES TECUM OF: JUDITH P. WILKENFELD
20 DATE: Wednesday, April 26, 2000
21 TIME: 9:36 a.m.
22 LOCATION: Offices of
23 Charleston Place Hotel
24 130 Market Street
25 Charleston, South Carolina
26 TAKEN BY: Attorneys for the Defendant(s)
27 REPORTED BY: MADONNA M. FARRELL
28 REGISTERED PROFESSIONAL REPORTER

29 STENOTYPE REPORTING SERVICE
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34 MADONNA M. FARRELL, RPR - STENOTYPE REPORTING SERVICE

1 APPEARANCES:

2 APPEARANCES FOR PLAINTIFF

3 Suzanne Q. Little, individually and as
4 Personal Representative of the Estate of
5 SAMUEL MARTIN LITTLE, Deceased:
6 NESS, MOTLEY, RICHARDSON, LOADHOLT
7 & POOLE

6 BY: CHARLES PATRICK
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9 APPEARANCES FOR DEFENDANT
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19
20 ALSO PRESENT:

21 CHARLES EDMONDS, VIDEOGRAPHER
22
23
24
25

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1 STIPULATION: It is stipulated by and
2 between Counsel that this deposition is being
3 taken in accordance with the Federal Rules of
4 Civil Procedure; and that the deponent does not
5 waive reading and signing of this deposition.

* * * * *

7 JUDITH P. WILKENFELD, being first duly
8 sworn, testified as follows:

9 VIDEOGRAPHER: On the record at
10 approximately 9:36.

11 EXAMINATION

12 BY MR. HOFFMANN:

13 Q. Ms. Wilkenfeld, I'm Bill Hoffmann. We met in
14 Washington, and this, of course, is a continuation of your
15 deposition yesterday and several weeks earlier in
16 Washington, and I take it that you understand that you're
17 still under oath?

18 A. I do.

19 Q. I apologize for not having been here yesterday.
20 It was unavoidable, and I have discussed with the lawyers
21 the questioning that occurred yesterday, and I'm going to
22 do my dead-level best not to be duplicative, although at
23 some points it will be necessary to put my questions in

24 context maybe to cover lightly areas that have been
25 covered before. But -- and I apologize in advance to the
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1 extent that I may be unavoidably or inadvertently
2 duplicative.

3 I also understand that you need to leave at
4 3:30, and I don't anticipate that being a problem.

5 I think that we would all be well served if you
6 would listen carefully to the question and try to answer
7 the question that I ask, as much as you may wish to give
8 me additional information not called for by the question,
9 consistent with the goal of ending by 3:30.

10 I'll try to not be duplicative, and I hope
11 you'll try to be responsive to the particular question
12 posed.

13 First, I'd like to ask you about something that
14 did come up yesterday, and that is your response to the
15 Request Number 7 on Schedule A to the Amended Notice of
16 Continuation of Videotape Deposition Duces Tecum, and that
17 is that you produce a copy of any and all documents
18 referencing or related to the meetings with the Committee
19 on Tobacco Product Change, including but not limited to
20 any notes taken during the meeting -- the meetings and
21 minutes of the meetings.

22 It's my understanding that yesterday you
23 declined to produce those documents and asserted a
24 privilege in that regard.

25 My first question is, having had time to
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1 consider it overnight, have you changed your position in
2 that regard?

3 A. No.

4 Q. And I would like to make clear on the record
5 that although this notice was served by Reynolds, that
6 Brown & Williamson would also join in that request.

7 A. Okay.

8 Q. Now, I also understand that yesterday, there was
9 some discussion of your area of expertise, and if I
10 understand it correctly, you testified that you were an
11 expert in regulation of tobacco products; is that correct?

12 A. As defined by my experience at the Federal Trade
13 Commission and the Food and Drug Administration, yes.

14 Q. Okay. Well, let's -- let me -- let me go
15 explore that area of expertise for just a minute. There
16 are a number of ways, as I understand it, that tobacco
17 products are regulated. One such way would be
18 advertising, which may not regulate the product, but
19 certainly regulates the way the product is advertised. So
20 I take it you consider yourself an expert in regulations
21 with regard to tobacco advertising; is that correct?

22 A. Yes.

23 Q. Another way that tobacco products are regulated
24 is by requirement that they be accompanied by warnings,
25 that advertisements be accompanied by warnings. Are you
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1 an expert in the regulation of tobacco products, as far as
2 warning requirements are concerned?

3 A. If you mean the inclusion of the Surgeon
4 General's warning and the government-mandated warnings,
5 yes.

6 Q. Well, there aren't any other warnings required
7 by any kind of state and federal regulation, are there?
8 A. No.

9 Q. Now, the agricultural aspects of tobacco, I
10 understand, is subject to certain regulation, both in
11 terms of the way the tobacco is grown and the warehousing
12 system and the auction system by which tobacco is sold.
13 Are you an expert in that area?

14 A. No.

15 Q. Are you an expert in regulations relating to the
16 import and export of tobacco products?

17 A. Only so far as they are -- as they relate to the
18 display of the Surgeon General's warning, and other
19 government-mandated warnings.

20 Q. Are you an expert in --

21 A. And further -- and further, the requirement that
22 plans be filed by importers with the Federal Trade
23 Commission regarding the display of the warning in
24 advertising and on packages, it is a requirement of
25 registration.

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1 Q. Okay. Insofar as one might consider the
2 taxation of tobacco products a form of regulation, are you
3 an expert in that area?

4 A. No.

5 Q. Can you think of any other way in which tobacco
6 products are regulated today that I haven't asked you
7 about?

8 A. At the Food and Drug Administration, we
9 attempted to regulate tobacco pursuant to the Food, Drug
10 and Cosmetic Act as a drug delivery device. To the extent
11 that that experience is at all relevant, I'm an expert in
12 what went on.

13 Q. Okay. My question, though, was can you think of
14 any other ways, other than the ones we've discussed, that
15 tobacco products are, in fact, regulated today, and I
16 think by its definition, that question excluded the FDA
17 regulations because the Supreme Court has held that those
18 regulations aren't valid.

19 So back to my question, is the current
20 regulation of tobacco products, can you think of any areas
21 that I haven't covered?

22 A. I have a working knowledge of the access laws in
23 most of the states, as well as the Sign-on regulations
24 which would be the sale of the product to underage
25 consumers.

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1 COURT REPORTER: I'm sorry; I didn't
2 hear you.

3 THE DEPONENT: The sale of the product to
4 underage consumers.

5 BY MR. HOFFMANN:

6 Q. And when you say you have a working knowledge,
7 what do you mean by that?

8 A. The FDA instituted a program of compliance
9 checks in which we tried to contract with the 50 states.
10 In doing so, we worked very closely with the folks in
11 SAMHSA -- S-A-M-H-S-A, it's an acronym -- as well as with
12 the states.

13 So I developed somewhat of a knowledge of what
14 was going on, how compliance checks were conducted, what

15 type of -- what type of penalties were being used, the
16 success, the failures.

17 Q. I suppose that the terms of what is referred as
18 the master settlement agreement, together with the
19 individual settlement agreements with Mississippi,
20 Florida, Texas, and Minnesota, could also be considered a
21 form of the regulation of the sale of tobacco products.
22 Would you agree with that characterization?

23 A. It's a contractual agreement, so I'm not sure it
24 could be called state regulation.

25 Q. Okay. But it's a -- there are -- there are, in
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1 fact, Consent Orders that have been signed that would
2 allow the enforcement of those provisions in the court
3 without filing -- first, without filing a breach of
4 contract claim; are they not?

5 A. This is not an area I'm that familiar with.

6 Q. Okay. Well, I guess that answers my question --

7 A. That answers you're question.

8 Q. -- you're not an expert in that area?

9 A. No, I have some familiarity; I've given some
10 advice, but on substantive areas as opposed to procedural
11 areas.

12 Q. Okay. Now, I asked you about current
13 regulations, current ways that the tobacco industry is
14 regulated. Can you think of any ways that the tobacco
15 industry has been regulated, historically, that we have
16 not covered? And, again, I would exclude the FDA, because
17 those regulations never, in fact, went into effect?

18 A. Well, in fact, the access restrictions did go
19 into effect. And they, in fact, collected a million
20 dollars in penalty payments. So they were quite effective
21 for a very brief period of time, and that was under court
22 permission. I don't think the Supreme Court's decision
23 goes back and invalidates that; that's a decision that
24 awaits Justice Department consideration.

25 Can I think of any other type of regulation? It

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1 depends on what you mean by "regulation."

2 Q. Well -- well, when you say that you're an expert
3 in the regulation of tobacco products, I'll use your
4 definition of regulation.

5 A. I think for the purposes of this proceeding,
6 that would be the extent of it. I have a lot of working
7 knowledge of what goes on at the Office on Smoking and
8 Health. I wouldn't call that regulation -- well, no, I
9 wouldn't call that regulation. Similarly, with other
10 parts of the Department of Health and Human Services,
11 which I would also call, probably, administration rather
12 than regulation.

13 Q. Okay. Now, I want to try to get some
14 understanding, then, of the type of expertise you have
15 within this area.

16 Let's suppose for a moment that regulations were
17 to go into effect through the FDA, or some other agency,
18 that would regulate the amount of benzopyrene that a
19 cigarette could deliver.

20 Now, I take it, you would not be an expert in
21 determining what that level of benzopyrene should be, but
22 you might, in fact, be an expert that, once the scientists
23 determine what that level should be, you'd be an expert to

24 be able to draft the regulations that would implement that
25 scientist's recommendation; is that a fair

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characterization?

A. Could you repeat it, again?

Q. Okay.

A. Since you want a one-word answer, I want to make
sure I got the whole part of it correct.

Q. Are you an expert in making the determination as
to what would be a reasonable level of benzopyrene
delivery for a cigarette to have?

A. To making the scientific judgment?

Q. That's right.

A. I cannot make a scientific judgment. I can make
a judgment based upon the recommendations of scientists.

I think in this respect, I have one addenda to
make to my resume, which is that I was just appointed as
vice chairman of the WHO Scientific Advisory Committee,
and I think it's called on product regulation; I haven't
received all of the documentation on it yet. This is an
international group that will look at the issues of
product regulation.

Q. Okay. So if I were to ask the same question
about any constituent of tobacco smoke, tar and nicotine,
tobacco specific nitrosamines, would it be fair to say
that you are not an expert in the area that would allow
you to recommend the extent to which regulations ought to
limit the delivery of those --

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A. Only to the extent --

Q. -- toxins?

A. Only to extent of accepting the recommendations
of scientists and determining, on the basis of that,
whether or not the regulatory is standard.

Q. Okay. And -- but you would be an expert, and
once the scientists came up with that, of drafting a nice
tight regulation, right?

A. Making it consistent, yes, with the --

Q. Okay.

A. -- with the requirements.

Q. And so if I were to go through a series of
questions today and ask you whether a reduction in tar
from, say, 600 milligrams a day to 300 milligrams a day is
toxicologically significant, that's not an area that you
could offer me an expert opinion in; is that correct?

A. No, I can offer you a regulatory opinion. I'm
not an expert; I'd have to rely on the scientific experts.

Q. Well, what would a regulatory opinion on that
question be?

A. Whether a reduction from 600 to 300?

Q. Milligrams a day of tar is toxicologically
significant?

A. Without more information, probably I wouldn't
have an opinion.

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Q. Okay. All right. Now, if we go back to your
expertise about the regulations of tobacco advertising
conducted by the FTC, what is it that you have an
expertise in that could not be determined by, you know, a
nice bright hard working young associate in a good law

6 firm who researched the rules and decisions and policies
7 and procedures and the court decisions in this area?

8 A. First, I want to amend, by advertising,
9 advertising, promotional and marketing.

10 Q. Right. Okay.

11 A. It would be the entire panoply of --

12 COURT REPORTER: I'm sorry; the entire
13 what?

14 THE DEPONENT: Advertising, promotion and
15 marketing, the entire panoply of whether the
16 associate is just marketing the product.

17 How do I have more? Well, I certainly would
18 have been paid more than the associate.

19 My experience -- in government regulation,
20 experience comes with time, with having spent a
21 lot of time analyzing ads, working with experts in
22 the fields of copy test and consumer research,
23 bringing cases, winning cases, losing cases,
24 finding out, you know, how tight the law is, what
25 the law requires. It's not a scientific

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1 expertise.

2 BY MR. HOFFMANN:

3 Q. Okay. How would your expertise be any different
4 than that of, for example, a partner at the Collier,
5 Shannon Law Firm who has spent his or her entire career
6 practicing before the FTC?

7 A. Well, I would hope that I would know what went
8 on inside the government and they wouldn't.

9 Q. Okay.

10 A. I mean, there is -- most of government work
11 should be confidential. And so 90 percent of what I
12 learned in the government and what is required to get a
13 case complaint issued, should not be obvious to the
14 public. And so, hopefully, the folks at Collier, Shannon
15 wouldn't know that.

16 Q. Well, is that a matter of expert opinion, or is
17 that just a matter of knowing facts, historical facts?

18 A. I think I have to leave that to the finder of
19 law. I don't think that's up to me determine, the
20 question of whether I'm an expert.

21 Q. Well, do you have an opinion in that regard, as
22 to whether the area you just described knowledge of, what
23 goes on inside the government, is an area of factual
24 knowledge or an area of expert opinion?

25 A. I think it's expert opinion in the sense that

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1 it's learned the way any other art or science is learned.
2 It requires study. It requires diligence. If there's an
3 area called regulation, and regulation of -- and
4 government regulation, then I'm an expert in that.

5 Q. And you said earlier that something like -- did
6 you say 90 percent of this is confidential or should be
7 confidential?

8 A. Yeah, I may not have the number right, but I
9 know that most of what we do is supposed to stay
10 non-public.

11 Q. So would that mean that you can't offer expert
12 opinions on that area in trial or in deposition?

13 A. I can certainly offer opinions on what I learned
14 from that.

15 Q. Well, would it be fair to say that because this
16 is confidential, you can't disclose the factual basis of
17 all those opinions?

18 A. Over a period of time -- actually, I checked
19 this with the Federal Trade Commission before I agreed to
20 do this; I asked if a case was closed after a certain
21 period of time, was the information contained in that
22 deliberation any longer non-public. And they said, no, I
23 could talk about that.

24 So a case that came to fruition and did get
25 litigated and ended in a consent, most of the materials

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surrounding that are now disclosable by me.

2 Q. Okay. And the reason for that, I take it, is
3 because the case has been finally disposed of, either by a
4 court decision or by a consent, correct?

5 A. Correct.

6 Q. And that --

7 A. And the period of time has passed.

8 Q. Right. And that court decision or that consent
9 would, in effect, supersede everything else that had
10 happened in the case, correct?

11 A. Super -- I'm not sure I understand what you mean
12 by "supersede."

13 Q. Well, if there are allegations made in a case,
14 in a complaint for example, and if they -- then there are
15 ultimately findings and conclusions of law by a court, one
16 has to accept those findings and conclusions, as far as
17 that case is concerned, and no longer contend that those
18 findings and conclusions are wrong and the allegations in
19 the complaint are right; isn't that true?

20 A. As far as the parties --

21 COURT REPORTER: I'm sorry; I didn't
22 hear you.

23 THE DEPONENT: As far as the parties to the
24 complaint are concerned, that's correct.

25 BY MR. HOFFMANN:

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1 Q. Now, how does your knowledge or expertise about
2 what goes on inside government, which may be confidential
3 at the time it occurs, how is that relevant to this
4 lawsuit?

5 A. The lawyers from Ness, Motley believe it's
6 relevant. It was not my determination whether it was or
7 wasn't.

8 Q. Well, do you believe it's relevant?

9 A. To the extent that the advertisements for
10 certain products conveyed certain messages, that might be
11 relevant.

12 Q. Well, all right, my question is, though, what
13 went on, on a confidential basis, inside government?

14 Can you tell me, sitting here today, what went
15 on, on a confidential basis, inside government that you
16 believe might be relevant to this lawsuit?

17 MR. PATRICK: I'm going to object to the
18 question as being over-broad, but if you can -- if
19 you can answer it, go ahead.

20 THE DEPONENT: The only aspect on which I was
21 consulted had to do with the regulation of tobacco
22 advertising at the Federal Trade Commission when I
23 was there. How that ties into Mr. Little's

24 smoking and his problem, I don't know.

25 BY MR. HOFFMANN:

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1 Q. Okay. You gave me an answer in terms of the
2 regulation of tobacco advertising, but my -- again, my
3 question is, can you think of anything, as we sit here
4 today, that went on, internally, inside government that
5 was confidential at the time, but is now relevant to this
6 lawsuit?

7 MR. PATRICK: I'm going to object,
8 again. But, again, if you can answer it.

9 THE DEPONENT: I actually can't. I'm not --
10 I'm having trouble understanding what the question
11 means as far as I'm concerned.

12 BY MR. HOFFMANN:

13 Q. Okay. Well, let me try it again.

14 You said that one of your expert -- areas of
15 expertise is knowing what went on inside of government and
16 that some percentage of that, maybe 90, maybe something
17 less than 90, is confidential; am I right about that?
18 That's what you said.

19 A. Yes.

20 Q. Okay. Now, what I'm trying to do is figure out
21 how that particular expertise is relevant to this lawsuit.

22 So since you have that expertise, you must, as
23 you sit here, have in your head, knowledge of things that
24 went on inside of government that I don't know about,
25 okay?

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1 And this is a discovery deposition, and I'm
2 trying to discover what you have to say that might be
3 relevant to this lawsuit.

4 So I want you to think about those things that
5 are inside your head, that you know, that went on inside
6 government, that I might not know about, that you think
7 have some relevance to this lawsuit, and I want you to
8 tell me what those things are?

9 A. I was consulted about the FTC tar and nicotine
10 testing method, about the commission's processes in
11 seeking to modify the process, why they may have modified,
12 why they may not have modified it, how it was used, what
13 we knew about both the strengths and weaknesses of the
14 process, what more we learned about that during the
15 Barclay trial, up to, I guess, including at the present.

16 Secondly, on the American Brands lawsuit, or
17 consent, what that ad said to consumers and how the
18 commission came about determining that that was a
19 violation of the FTC Act.

20 Q. Okay. You went kind of fast, so I'm going to
21 have to try to go back through some of those in detail.

22 All right, so you were consulted about the FTC
23 tar and nicotine testing method. Was that the first thing
24 you said?

25 A. Yes.

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1 Q. Okay. Now, what can you tell me about the FTC
2 tar and nicotine method as an expert in government
3 regulation who has knowledge about the inner workings of
4 government, that I don't have, that's relevant to this
5 case?

6 A. I can tell you what I know. I can't tell you
7 whether it's relevant to the case. That's for the Ness,
8 Motley firm to determine what they want me to testify
9 about.

10 Q. Tell me what you know about the FTC and tar and
11 nicotine testing method that I couldn't find out from
12 publicly available documents?

13 A. I don't know if you would know from reading
14 publicly available documents which ones accurately tell
15 you what's going on and which ones don't. There's a lot
16 of opinion out there on the procedure.

17 I can tell you the -- do you want to go back to
18 the beginning and start in 1983, when I took over the
19 program?

20 Q. Okay.

21 A. And the concerns that the commission had about
22 the tar and nicotine testing, what it was they thought was
23 important then, the process they went through to try to
24 get a sufficient body of evidence together to modify the
25 procedure to meet those concerns, the impossibility of

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getting that information from the industry, the type of
intransigence we met with the industry and discussions
with them about the procedures; the failure of the
commission to be able to modify its procedure because of
its inability to get information; what we learned during
the Barclay trial both from Philip Morris and R.J.
Reynolds, but also from Brown & Williamson; Brown &
Williamson's position about the tar and nicotine testing
procedure at that time, which was both, I think, in print
as well as in conversations with us that it was a
virtually worthless system, but they continued to use it
in advertising after that, despite the fact that they had
said to us at that time that it had no value; what went on
from 1983 until I left in 1994, in my attempts to get the
commission to address the problems of the procedure.

Q. Okay. Tell me the story. Tell me about all of
that. You listed the topics you could tell me about. I
want to hear what you have to say about them.

MR. PATRICK: Well, I'm going to object
to the question as being over-broad. And I think
in the course of the deposition, there should be a
question and answer format.

MR. HOFFMANN: Okay. That's fair enough.

BY MR. HOFFMANN:

Q. Let's go back, and you gave me a very long
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answer, and you gave me a laundry list of things that you
could tell me about. Let's go back and tell me what the
first item on the laundry list was.

A. I don't know what the first item was.

Q. Well, then gives me the first one that comes to
your mind now.

MR. HOFFMANN: Can you go back and read
the last answer?

COURT REPORTER: Slowly?

MR. HOFFMANN: I beg your pardon?

COURT REPORTER: Slowly?

MR. HOFFMANN: It wouldn't be the last
answer, but you know the one I want.

(The Court Reporter read the answer on page

15 842, line 13 through page 842, line 17.)

16 MR. HOFFMANN: Okay, stop.

17 BY MR. HOFFMANN:

18 Q. All right. Now, I believe what you said is when
19 you took over the program in 1983, you could tell me about
20 the concerns the commission had about the testing method
21 then.

22 A. Okay.

23 Q. Tell me about that.

24 A. Okay. When I took over the program in 1983, the
25 commission had already spent, I guess, it was almost two
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1 years on the Barclay matter. They had hired three
2 consultants who had the agreement of the industry to look
3 at the allegations that had been brought to us by Philip
4 Morris and R.J. Reynolds.

5 The questions that were raised were not within
6 the expertise of the commission, because they had no real
7 scientists on board. The major problem with the
8 commission running a testing laboratory was that at its
9 head, it had a chemist whose sole job had always been to
10 run this lab, who had no real expertise beyond that.

11 By the time I came there in 1983, funding for
12 the lab was sore, sorely wanting. And so the lab, itself,
13 was beginning to fall into disrepair. So they had to look
14 for outside expertise.

15 The three experts who were hired were Mike
16 Guerin from Oak Ridge who had money to do testing, who was
17 an expert in the -- he was analytical chemist, and he had
18 expertise in the area of machine technology; Fred Bock,
19 who was an expert in the disease area; and Lynn Kozlowski
20 in consumer psychology and addiction.

21 The report that they brought back indicated, at
22 varying levels of differences of opinion, that the Barclay
23 cigarette created problems with the testing procedure that
24 were over and above the problems that all cigarettes have
25 with the testing procedure; that although there was a
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1 problem of compensatory smoking caused by cigarette design
2 and human biology, that Barclay, in fact, had been
3 engineered so that it couldn't be tested accurately, even
4 with the limitations noted. And the recommendation was
5 made to the commission at that time to take some action
6 about Barclay.

7 But at the same time, the commission became
8 acutely aware of the fact that compensatory smoking was a
9 problem that called into question the ratings and the
10 importance of the ratings.

11 At the same time that this was going on -- well,
12 we went into a period of two years after -- I think it was
13 two years, or a year and a half, when Brown & Williamson
14 had gotten an injunction. The commission took the
15 injunction that the Western District of Kentucky issued
16 very seriously, and actually shut down the lab and all of
17 the processes associated with that, and anything that had
18 to do with the investigation. It assumed that the
19 injunction was total.

20 But at the same time, Brown & Williamson had
21 filed a complaint, I don't know whether it was formal or
22 informal, with the commission about the advertising of its
23 competitors, Carlton, Now and Cambridge. And so I looked

24 into that at the time, which led into a recommendation
25 that action not be taken, but it again pointed up that
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1 things were going on in the industry that were not
2 consistent with what the commission was doing, and, in
3 fact, called -- again, called into question a lot of the
4 problems, a lot of things going on in the lab.

5 In the case of Cambridge, Carlton and Now, there
6 were two things that were going on. One, is that the
7 companies -- at least two of the companies, I think, were
8 testing the cigarettes differently than the FTC was doing,
9 and that created a question for the commission as to
10 whether it would go forward and try to challenge these
11 alternative systems and support its own system as being
12 the more correct.

13 And, secondly, that these products were being
14 sold -- they were being advertised in their box variety at
15 a very, very low number, in fact, a lower number than the
16 FTC was able to achieve on its machine.

17 And the two problems as I said, one, is that our
18 machine wasn't able to do that technology to get those
19 numbers. So there was a different technology being used.

20 And, secondly, that there might be an
21 advertising violation here, which was that they were
22 advertising a product as being very low, but, in fact,
23 that product wasn't being sold, or at least not sold in
24 any numbers that were meaningful. So that there was sort
25 of a bait and switch, because it turned out that the box

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1 85 and the pack 85 actually had different tar levels, and
2 the consumers were probably not aware of it.

3 At that time, the decision was made not go
4 forward for two reasons. And I was asked yesterday about
5 recommendations not to proceed if they were violations
6 that were perceived. This was a case in which violations
7 were perceived and an action was not taken.

8 And the reason I can talk about this is a memo I
9 wrote on this is released by Tom Luken in a hearing
10 sometime later. So it certainly is public by now.

11 The reasoning was, was one was resources. We
12 couldn't pursue too many cases at the same time. But,
13 secondly, we couldn't justify our procedure, the FTC tar
14 and nicotine testing procedure, as being more accurate,
15 better or more valid than what the companies were using in
16 getting different numbers.

17 As a matter of fact, we weren't very comfortable
18 that either one of them was necessarily valid, but we
19 didn't feel we had the legal or factual predicate to be
20 able to challenge any other testing methodology as having
21 been better or worse, and certainly not in violation of
22 Section 5 of the Federal Trade Commission Act.

23 Q. At the time were cigarette requirements
24 required -- or cigarette advertisements required to set
25 forth the FTC method tar and nicotine numbers?

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1 A. The Federal Trade Commission had instituted a
2 trade regulation rule that would have required the
3 inclusion of numbers in advertising. In fact, that trade
4 regulation rule was abandoned, and the companies agreed
5 voluntarily, amongst themselves, to include numbers in a

6 certain legend in a certain format in advertising. The
7 commission was not a signatory to that decision by the
8 companies. But in reliance on that, the commission
9 dropped its trade regulation rule. By --

10 Q. Well --

11 A. -- the time we went to court in 1983, our
12 position was that, no, the companies were not required to
13 display the FTC number, but that they did so voluntarily.

14 Now, what would have happened between 1970 and
15 1983, had they not done it, is an open question.

16 Q. So as I understand it correctly, the FTC was
17 going to require the listing of such numbers on
18 advertisements, and then the industry agreed to do it
19 voluntarily, so the FTC dropped its proposed requirement
20 that would have forced the industry to do it; is that
21 correct?

22 A. That's correct. The commission, however, did
23 not go through the formalities of the trade regulation
24 rule in order to set up the procedure, so it did not have
25 a record in which to justify the imposition of that

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1 requirement, something Gerhardt Gasell mentioned several
2 times during the hearing -- the trial, which was that we
3 had no legal right to ask the companies to put in the
4 numbers, and the companies therefore had no legal
5 obligation.

6 Q. Okay.

7 A. Should I continue?

8 Q. Yes, please.

9 A. Okay. So my recommendation at that time was not
10 to take action against the additional -- the companies
11 that Brown & Williamson had complained about, their
12 advertising, but that went into the commission's thinking
13 about the problems with the methodology.

14 The concerns that were raised by that, that
15 investigation, just added to our concerns about -- our
16 discussed concerns about compensatory smoking. It
17 indicated that our surety about the methodology, both as
18 having validity and importance, was questioned in a
19 greater degree.

20 On the other hand, the commission continued to
21 believe that if smokers could smoke in the same manner as
22 the machine, they would receive less tar if they smoked
23 cigarettes lower on the FTC tar ranking than if they had
24 smoked higher tar cigarettes in the same manner.

25 Our understanding at that time was very

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1 incomplete about compensatory smoking. What we knew
2 seemed to be quite mechanical and have to do with actions
3 that individuals could take to change their behavior, more
4 puffs, fewer puffs, more cigarettes, fewer cigarettes,
5 covering the holes, not covering the holes. In '83, the
6 holes were still pretty visible.

7 Burn rates, we understood, but we thought that
8 that was something still consumers would know. We didn't
9 have as great an understanding about depth of inhalation,
10 about manipulation of the product that might have made the
11 involuntary types of compensatory smoking more important.

12 Q. All right. Let me stop you and ask you a couple
13 questions about those two points.

14 Are there any studies that conclude that smokers

15 of lower-tar products, inhale more deeply than smokers of
16 higher-tar products?

17 A. Any studies that show? There probably are.

18 Q. Do you know -- well, do you know if there are?

19 A. Do I know?

20 Q. Yes.

21 A. No, at this point, I'd have to -- well, I mean
22 --

23 Q. Well, let me ask you this question, then. I
24 think one of your answers implied that -- that, in fact,
25 smokers of low-tar products inhale more deeply than

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1 smokers of high-tar products and you didn't know that in
2 1983. What makes you believe that to be the case now?

3 A. The -- when Michael Thun's study using the
4 American Cancer Society, CPS 1 and 2, and he was looking
5 at the movement of lung cancer, one of the theories had to
6 do with depth of inhalation and where the smoke deposited.
7 I certainly didn't know anything about that back in 1983,
8 nor did the commission.

9 If what I read in his article was correct at
10 that time, people weren't counting -- you know, I can't
11 remember which is squamous, which is adenocarcinoma. We
12 weren't counting all types of lung cancer; we were only
13 counting the large cell.

14 Q. But that, that theory about depth of inhalation
15 that smokers of low-tar products inhale more deeply than
16 smokers of high-tar products, as we sit here today is
17 still, in fact, a hypothesis that has not been proven;
18 isn't it?

19 A. I don't know.

20 Q. Okay. And do you contend that the tobacco
21 industry had information about the depth of inhalation of
22 low-tar smokers that the public health community did not?

23 A. I don't know, and that was one of the problems
24 that the commission faced in 1983, is that it did not have
25 the information of what the industry might or might not

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1 have known.

2 Q. Okay. But as we sit here today, you still --
3 you don't know whether the industry had more information
4 on that than the public health community in 1983 on depth
5 of inhalation?

6 A. This is not an area on which I'm expert.

7 Q. Okay. Then the second thing you talked about
8 other than depth of inhalation was manipulation of the
9 product. What did you mean by that?

10 A. Again, this is not an area I'm expert in. At
11 the FDA when we were looking at the question of assertion
12 of jurisdiction, they looked at -- they looked at the PH
13 of the smoke.

14 Q. Okay. Well, let me stop you. If you're not an
15 expert in this area, unless you can give me some factual
16 information about what you mean by manipulation of the
17 product, I don't want to waste our time talking about.

18 A. Okay. That's fine.

19 Q. Okay.

20 A. Okay. And, in fact, what I'm accurately
21 describing is the fact that the commission did not have
22 the expertise at that time and therefore relied on what it
23 could find available in the literature.

24 And what was available in the literature at that
25 time, applied mostly to the types of consumer
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1 compensation. It looked as if they might be able to be
2 addressed by the consumer with enough knowledge.

3 Q. Okay. And let me interrupt you on one more
4 thing; you're aware, of course, the issue of hole blocking
5 is an issue in this lawsuit, correct, or maybe you're not?

6 A. No, I'm not.

7 Q. Okay. Well, you did mention that in 1983, the
8 commission did have knowledge of hole blocking as a
9 technique of compensation; is that correct?

10 A. Yes, Lynn Kozlowski probably was one of the
11 gurus of hole blocking.

12 Q. And Lynn Kozlowski has testified recently in a
13 Maryland case that the commission first knew about hole
14 blocking when it was brought to its attention by Lorillard
15 in the late-1970s, and I believe there's a point in
16 Monograph 7 where it's indicated that the phenomenon of
17 hole blocking was brought to the commission's attention by
18 Lorillard in 1977. Do you know if that's correct?

19 A. I don't know if that's correct, but I was shown
20 a document yesterday that would indicate that that was
21 brought to their attention, and that they chose not to
22 modify the procedure based upon the allegations of that.

23 Q. Let's just take a minute and look at the
24 Kozlowski document.

25 (DFT. EXH. 112, Lynn T. Kozlowski, Ph.D.
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1 deposition taken 10/23/98, was marked
2 for identification.)

3 MR. HOFFMANN: Charles, I've only got
4 two copies, we can make you a set later.

5 MR. PATRICK: That's fine.

6 BY MR. HOFFMANN:
7 Q. I want to show you what's been marked as Exhibit
8 Number 112, and this is an excerpt from Lynn Kozlowski's
9 testimony in the State of Maryland against Philip Morris
10 on October 23rd, 1998. And if you'll go over to page 230,
11 I want to read a little of this.

12 A. This is a deposition, not a --
13 Q. Oh, I'm sorry; did I say testimony?
14 A. Yes.
15 Q. Yes, in fact, it is a deposition.
16 Well, let's go back and talk about who Lynn
17 Kozlowski is for a minute. Lynn Kozlowski, would you
18 agree, is one of the pioneers in the literature on
19 ventilation hole blocking as a technique of compensation?
20 A. Yes.
21 Q. And Lynn Kozlowski is somebody that the FTC
22 hired as an expert consultant, correct?
23 A. Correct.
24 Q. And, in fact, the FTC used Lynn Kozlowski as an
25 expert witness in the Barclay case, correct?
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1 A. We used him as an expert; he did not appear as a
2 witness.
3 Q. Okay. He was deposed, wasn't he?
4 A. He was deposed, but he did not testify.
5 Q. And Lynn Kozlowski's opinion is an opinion that

6 the FTC valued, correct?

7 A. Correct.

8 Q. And as we sit here today, Lynn Kozlowski is
9 someone whose opinion you value; is that correct?

10 A. Yes.

11 Q. Okay. Now, on page 230, let me just read
12 through some of this and see if you agree with it.
13 Beginning with line 15, "And during that 30 years, at some
14 point, the FTC became aware of the vent hole block -- of
15 the vent hole blocking issue," correct?

16 A. Page 230 and line what?

17 Q. 230, line 15.

18 A. Yes.

19 Q. And "That might be said that at a few points
20 they became aware of it. Let's talk about those points.
21 When was the first time to your mind, or to your
22 knowledge, that the FTC first became aware of the general
23 issue of vent hole blocking? Well, I learned for the
24 first time -- just in the past few years, that it was
25 first raised to their attention by -- I think it was

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1 Lorillard -- complaining about the insertion depth that
2 was used. The cigarette insertion depth in the holder
3 that -- I think that the suggestion was that the insertion
4 depth was plugging up some of the vent holes on some of
5 their brands and couldn't that insertion depth be changed?

6 And I think that is the first time, and actually
7 I wasn't aware of that until just a couple years ago."

8 The second time was the Barclay case."

9 "No, I think I can cut to the quick with this
10 question. In both instances, one I think you said, was
11 1970 -- I can't -- did you say 1977?

12 For Lorillard, I didn't give a date.

13 But it was in the late-1970s?

14 I didn't know about it at the time. That my
15 start in the vent area was '79, '80, and so I just didn't
16 know about it.

17 So sometime before 1979 and the early-1980s, the
18 FTC became aware of this vent hole blocking issue in a
19 general sense?

20 That's the best of my knowledge, it would be
21 easy to look up when this Lorillard matter was."

22 Now, do you agree with all of that?

23 A. All of it?

24 Q. Yes. Is there any of that you don't agree with?

25 A. Well, you know, I don't know if it was brought

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1 to the commission's attention on any other occasion other
2 than Lorillard.

3 Q. Okay.

4 A. You know, when I looked at that yesterday, it
5 wasn't clear to me that the commission fully understood
6 the issue. They certainly decided not to take action
7 based upon whatever issues were raised.

8 Like Lynn, I was unaware of it prior to looking
9 at the document yesterday. It didn't come up -- during
10 the discussion of Barclay, it did not come up in the
11 commission's deliberations or discussions.

12 Q. Okay. And by "Lynn," you meant Kozlowski?

13 A. I'm sorry, Lynn Kozlowski.

14 Q. So I take it you're on a first name basis with

15 Dr. Kozlowski?

16 A. I've known Dr. Kozlowski since 1983, yes.

17 Q. In Monograph 7, which I believe is Exhibit 56,
18 if you want to look at it, on page 3, it says --

19 A. I'm sorry; what exhibit again?

20 MR. PATRICK: 56.

21 BY MR. HOFFMANN:

22 Q. 56.

23 A. Okay. It's the article by Samet.

24 Q. No, Peeler?

25 A. Oh, okay, then it's not 56.

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1 MR. HOFFMANN: Oh, it's -- what is it?

2 MR. YARBER: We didn't mark the whole thing.

3 MR. HOFFMANN: Oh, you may not have it.

4 MR. PATRICK: Peeler's testimony.

5 THE DEPONENT: No, what they did was they
6 gave me individual pages, so I --

7 MR. PATRICK: Peeler's testimony wasn't --

8 THE DEPONENT: Yes, I have the whole thing so
9 I didn't know what number it was. It was one of
10 the early ones.

11 BY MR. HOFFMANN:

12 Q. Well, let's see if we can save time; I'm happy
13 for you to look at my copy or I can read it to you, and
14 then you can --

15 A. I have it. It's Exhibit Number 5.

16 Q. All right. Look on page 3, if this paginated
17 the same way. It doesn't appear to be.

18 A. "Cigarette manufacturers continued, however, to
19 advertise tar numbers"?

20 Q. No.

21 A. Okay. Tell me what the sentence is.

22 Q. The sentence says, "Aeration first became an
23 issue for the commission in 1977."

24 A. Okay.

25 MR. PATRICK: Here I see it.

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1 THE DEPONENT: Okay.

2 BY MR. HOFFMANN:

3 Q. "Aeration first became an issue for the
4 commission in 1977, when Lorillard, Inc., suggested that
5 the depth to which cigarettes were inserted in the
6 commission's smoking machine be decreased when the
7 standard depth would block someone's cigarette ventilation
8 holes, thereby impairing its filtration system and
9 resulting in higher ratings than if the holes were open."

10 Now, do you agree with that?

11 A. I agree that if Mr. Peeler put this in his
12 statements then this must have been true.

13 Q. Okay. All right. I interrupted you to ask you
14 a few questions about your -- the answer you were giving.
15 Are you able to pick up your answer where you left off?

16 THE DEPONENT: Could you tell me where I
17 left?

18 COURT REPORTER: Could you tell me where to
19 start?

20 I can search it if you want me to.

21 MR. HOFFMANN: I think she's got it.

22 THE DEPONENT: No. I --

23 BY MR. HOFFMANN:

24 Q. Oh, you don't have it.
25 A. No, I know I had discussed the controversy of --
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1 that had been brought to our attention by
2 Brown & Williamson.

3 Q. I think you were discussing -- at one point in
4 the answer that we were going back and talking about, you
5 said something due to the fact about the difficulty of the
6 commission getting information from the tobacco companies
7 or the tobacco companies lack of --

8 A. I used the word "intransigence," yes.
9 Q. I think that is a word you used. Okay.
10 MR. PATRICK: I think she was
11 specifically talking about depth of inhalation and
12 the manipulation part as issues, and then you
13 picked up and asked her specifically about those
14 issues.

15 BY MR. HOFFMANN:
16 Q. Okay. I'll tell you what I want to ask you
17 about, though; I want to ask you about the tobacco
18 companies intransigence. Give me what facts support your
19 opinion that the tobacco companies were intransigent in
20 providing information that would allow the FTC to regulate
21 them better, if that's what your position is today?
22 A. When we put out a Federal Register notice -- I
23 can give you a specific example of the interesting
24 intransigence --
25 Q. Okay.

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1 A. -- as it doesn't specifically relate to
2 compensatory smoking.

3 Now, Philip Morris complained to the commission
4 about Barclay. It said it had done -- between it and R.J.
5 Reynolds, it had done ventilation studies, it had done
6 some consumer testing, said Here's the case, you know, all
7 you have to do is bring it. We went to court.
8 At one point, the consumer research became more
9 important than the science behind consumer smoking, and we
10 said to Philip Morris. Okay, we need the consumer studies
11 you said you did. You gave us the results you did, we
12 need the raw data. They said no. We lost that part of
13 the case.
14 That was not uncommon in our dealings that when
15 we would ask for -- we could get results, but we could not
16 really get raw data.
17 Q. Did the FTC have Subpoena power?
18 A. It certainly did.
19 Q. Why didn't --
20 A. Why didn't I use it at that time? I don't know;
21 it was in the middle of the trial. I can't tell you why
22 we didn't use it at that time. In fact, that's an
23 interesting question that I have asked the Federal Trade
24 Commission over the years, which is because of the
25 unwillingness of the industry to provide us with

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1 information about what they knew about compensatory
2 smoking and about the procedure, why don't they just issue
3 an Subpoena?
4 Q. And what did they tell you?
5 A. I've never gotten a good answer.

6 Q. What answers have you gotten?
7 A. I haven't really gotten an answer.
8 Q. And you've asked this directly to the
9 commissioners, themselves?
10 A. The commissioners, themselves, no. No, I've
11 asked that of the bureau of directors at various times
12 over the years, and recently I've asked Lee Peeler
13 repeatedly.
14 Q. Do you think the bureau director was in some
15 kind of conspiracy with the tobacco industry?
16 A. Regardless of the political party in power, I
17 would never say that about a bureau director at the
18 Federal Trade Commission.
19 Q. You wouldn't say that about anyone on the FTC,
20 would you, that they were part of a conspiracy with the
21 tobacco industry?
22 A. I wouldn't say that about anybody. I would say
23 that there were people who were more -- I would say that
24 at times I had problems with some of the economists who,
25 in fact, dealt directly with the companies during periods

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1 when they shouldn't have. So I wouldn't want to clear --
2 give a clear bill of health.

3 But the commission employees, generally, and
4 certainly the bureau directors and the commissioners acted
5 in a manner in which they thought was appropriate. But at
6 times, they were more or less sympathetic with the
7 industry, but that was in keeping with their political
8 persuasions which affected the elections, which is how the
9 system works.

10 Q. That's right. And because that's the way the
11 system works, there is no cause of action against either
12 the commission or tobacco companies, is there, because the
13 commissioners politically were not as aggressive against
14 the tobacco companies as you might like?

15 A. Absolutely.
16 Q. Absolutely not, there is no cause of action?
17 A. Oh, absolutely, there is no cause of action.
18 Q. Okay.
19 A. But nor should there be.
20 Q. Okay.
21 A. I mean, unless you can show -- I mean, I might
22 not like it during the periods of times when the agency
23 didn't agree with me, but I never once disagreed that that
24 was not the way the system was supposed to work. And, in
25 fact, unlike others, I stayed in government for 28 years

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1 through various administrations because I believe that
2 that's the way the American system is supposed to work.

3 Q. And do you know of anything the tobacco
4 companies did to influence the commissioners that you
5 would consider improper?

6 A. Do I know?
7 Q. Yes.
8 A. The commissioners?
9 Q. Yes.
10 A. No.
11 Q. Do you know of anything the tobacco companies
12 did to influence anyone at the FTC that you think would be
13 improper?
14 A. Yes.

15 Q. All right.
16 A. An action was brought against me on an ethics
17 charge and pursued with -- with the zeal that I found
18 un-understandable at the time; I still do.
19 Q. With a zeal that you found was --
20 A. Un-understandable.
21 Q. Okay?
22 A. Because it had to do with -- it had to do with
23 whether or not I had signed an article, which I had not,
24 in which the -- in which the publication admitted it had
25 done in error.

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1 Q. All right.
2 A. You know, I know they did the same thing with
3 people at EPA.
4 Q. Okay. Wait a minute, let me go back and see if
5 I can get --
6 MS. PARKER: I move to strike that
7 response as unresponsive.
8 MR. HOFFMANN: Okay.
9 THE DEPONENT: No, it wasn't unresponsive;
10 I'm sorry.
11 MR. HOFFMANN: All right. Let me see if I
12 can --
13 MR. PATRICK: It's just a motion.
14 BY MR. HOFFMANN:
15 Q. Let me see if I can make my question clear. Do
16 you -- and let me see if I can get a yes or no answer
17 before we go into what the facts are.
18 A. Okay.
19 Q. Do you know of any instance in which a tobacco
20 company or the tobacco industry did something improper to
21 influence someone at the commission?
22 A. No.
23 Q. Okay.
24 A. I know where I left off, if you want me to go
25 back there.

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1 Q. All right. Go ahead.
2 A. Okay. I had given some examples of things we
3 might not have known in 1983. And I think that given with
4 what we're looking for, I won't give examples of what we
5 might or might not have known, because other than the
6 fact -- because they're scientific areas that I would have
7 relied on others.
8 Q. Okay. Well, let me go back and ask you this,
9 though. I was asking you about the tobacco industry's
10 intransigence, and the example you gave me of that was
11 Philip Morris not giving you raw data relating to consumer
12 research. What other examples can you give me of the
13 tobacco industry's --
14 A. In 1983.
15 Q. -- intransigence?
16 COURT REPORTER: I'm sorry; I didn't get
17 it.
18 MR. HOFFMANN: Of the tobacco industry's
19 intransigence.
20 THE DEPONENT: In 1983, the commission
21 published a Federal Register notice asking for
22 assistance in looking at the future of the
23 procedure, given what we knew at that time about

24 compensation. Nothing useful was forthcoming from
25 the industry. I consider that intransigence.

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1 BY MR. HOFFMANN:

2 Q. Okay.

3 A. Same thing I think would be true -- no, I'll
4 leave it at that.

5 Q. Okay. And this is a -- and that was in
6 connection with the rule making procedure?

7 A. No, there was no rule making.

8 Q. What kind of procedure, what kind of legal
9 procedure was that in connection with?

10 A. Notice and comment.

11 COURT REPORTER: I'm sorry?

12 THE DEPONENT: Notice and comment.

13 BY MR. HOFFMANN:

14 Q. If the FTC had wanted to subpoena information
15 from the tobacco industry, such as any internal studies
16 they might have done on compensation or any internal
17 studies they might have done on how cigarette design
18 affects the delivery a smoker gets, is there a procedure
19 that the FTC could have initiated during which it could
20 have used subpoena power to obtain that material?

21 A. I believe so. And I certainly think that they
22 still could to this day. I know that the commission is
23 reluctant, at various times in its history, to have used
24 subpoena power.

25 I think -- I know certainly that the Subpoenas
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1 that led to the -- that were part of the investigation
2 that led to the 1981 staff report, involved the commission
3 in years of litigation in court, and so they were sort of
4 loathed to go back into that without really good cause.
5 They considered it a resource drain.

6 We did get compulsory process to look at the
7 issue of children's advertising, and I think it was the
8 late-'80s, but we kept narrowing the subpoena at the
9 request of the industry, again, because the commissioners
10 loath to get into litigation.

11 I can only assume that that might be one of the
12 reasons that subpoenas have not been issued, one is the
13 risk -- the desire to avoid going through litigation.
14 And, secondly, were there to be a document returned
15 eventually, are there resources to deal with that issue.

16 I think that's why, in recent days, the FTC has
17 said they really want the FDA to take over the tar and
18 nicotine testing procedure, because they just don't have
19 the resources to do it, to deal with the kinds of
20 information that they might have to deal with.

21 MR. HOFFMANN: Can we go off the record
22 for a minute?

23 VIDEOGRAPHER: Off the record at 10:35.

24 (A recess transpired.)

25 VIDEOGRAPHER: Back on the record at 10:50.

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1 BY MR. HOFFMANN:

2 Q. Okay I'm not going to go back and ask you
3 anymore questions about that earlier answer we've been
4 talking about.

5 I know you testified the first day that you know

6 Matt Myers, correct?
7 A. Correct.
8 Q. Is he someone whose opinions you respect?
9 A. Yes.

10 MR. HOFFMANN: Let's mark this as the
11 next exhibit.
12 (DFT. EXH. 113, 5/2/94 New York Times
13 Article, was marked for identification.)
14 THE DEPONENT: When I say I respect
15 someone's opinions, it doesn't mean I necessarily
16 agree --
17 MR. HOFFMANN: Oh, I understand.
18 THE DEPONENT: -- with them all the time.
19 BY MR. HOFFMANN:
20 Q. And you're probably not going to agree with this
21 one, but I'd like to ask it.
22 A. And I will tell you that at the moment I am now
23 a full-time consultant for the Campaign for Tobacco-Free
24 Kids, of which he is the president.
25 Q. Okay. First, I want you to look at what's been
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marked as Exhibit 113, and you are quoted in this article.
Do you recall giving this quote to the New York Times or
being quoted in the New York Times article in 1994?
You're quoted in the left-hand --
A. I was quoted, huh?
Q. All right. Look at the left --
A. Can I read it real quick? I'm a quick reader.
Q. Okay.
A. Okay. Thank you.
Okay. I've gotten -- I --
Q. Okay.
A. I just wanted to make sure I said what -- in
19 -- in that period, in 1994, I would have been an
employee of the commission and would have had to make a
commission statement --
Q. All right.
A. -- and make sure I did it right.
Q. Okay. I would like to direct your attention to
the left-hand column, about halfway down, that says as
follows, "The commission has been aware for quite a while
that the test has problems regarding the actual intake
that consumers get, Judith P. Wilkenfeld, assistant
director of the FTC's division of advertising practices
said in a telephone interview.
We know that consumers do not smoke in exactly
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the same manner as the machine used in testing, she said,
so the tests will not predict the actual human
consumption.
Ms. Wilkenfeld said the commission was looking
at alternatives to the tar and nicotine tests and added
that the pressure to make a decision had recently
increased."
Now, does that accurately reflect your position
at the time, in 1994?
A. That represents the position of the commission
at that time.
Q. Okay. In fact, the commission -- the commission
had known, since at least 1967, that the tests don't
predict actual consumer consumption, hadn't it, didn't it?

15 A. The documents that I was shown yesterday showed
16 that the commission had indicated that the tests did not
17 produce results that replicated human smoking for every
18 human being because they smoke differently.

19 Q. So I think that's an affirmative answer to my
20 question, right?

21 A. Yes.

22 Q. Okay. Now, if you will look over on the third
23 column, a little less than halfway down, it says, "Mr.
24 Myers" -- this is referring to Matt Myers --

25 A. Uh-huh.

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1 Q. -- "said the FTC and others agreed -- acted in
2 good faith in trying to establish the testing program
3 initially, but the commission could be criticized both for
4 sticking to the test for years after it became clear that
5 the test did not match the way people smoked and for
6 failing to explain the limits of the test in light of what
7 we know today."

8 Do you agree with that?

9 A. Yes.

10 (DFT. EXH. 114, Wilkenfeld Memo to FTC,
11 was marked for identification.)

12 BY MR. HOFFMANN:

13 Q. Let me show you what's been marked as Exhibit
14 114. And this appears to be a memorandum that you wrote
15 to the commission. And the copy I have is undated. Is
16 that, in fact, a memorandum that you wrote to the
17 commission?

18 A. It purports to be. I just need to take a quick
19 look.

20 Q. Take a quick look at it, and see if it's -- if
21 it appears to be a memorandum that you wrote.

22 A. This looks like it.

23 Q. In fact, it's initialed. Are those your
24 initials?

25 A. I think so, yes.

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1 Q. And while the memo isn't dated, it discusses the
2 commission's Federal Register notice of June 4th, 1984; so
3 when would this have been written, in late-1984?

4 A. Or it could have been 1985.

5 Q. '84 or '85. Okay.

6 A. Uh-huh.

7 Q. Turn over to page 6, if you will. At the bottom
8 of the page there, about five or six lines up, it says
9 "B&W"; or -- that means Brown & Williamson, doesn't it?

10 A. It does, yes.

11 Q. -- "agrees that the current FTC system is
12 misleading and should be abolished or replaced with a
13 brand new system. It argues that evidence suggests that
14 low-tar cigarettes deliver very little less tar to smokers
15 than high-tar cigarettes. Therefore, bans of high-,
16 medium-, and low-tar designation would provide more useful
17 information."

18 Did -- in the 1984-'85 time frame, did
19 Brown & Williamson, in fact, tell the commission that the
20 FTC testing system is misleading and that low-tar
21 cigarettes deliver very less tar to smokers than high-tar
22 cigarettes?

23 A. Yes.

24 Q. If you would, turn back one page to page 5, it
25 says there "The ALA"; is that the American Lung
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1 Association?
2 A. Yes.
3 Q. -- "comments that because of many and varied
4 differences in smoker use of low-tar products, the low-tar
5 cigarette may not be as safe as consumers have been led to
6 believe."
7 Did, in fact, the American Lung Association
8 inform the FTC of that position in 1984 and 1985?
9 A. If I put it in this memo, that probably
10 accurately reflects their comment.
11 Q. Okay. And then after that, there's a quote from
12 the American Lung Association, and you have no reason to
13 believe that that isn't an accurate quote from what
14 they -- the information they provided you, correct?
15 A. Yes.
16 (DFT. EXH. 115, B&W Submission to the
17 FTC, was marked for identification.)
18 BY MR. HOFFMANN:
19 Q. Let me show you what's been marked as Exhibit
20 115, and this appears to be a submission that
21 Brown & Williamson made to you on February 20th, 1986; is
22 that correct?
23 A. I'd have to look at this.
24 Q. Please.
25 A. You know, I don't have a recollection of this,
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but it purports to be sent to me. If it was produced by
the FTC, I would have clearly gotten it. I'm familiar
with the types of information that are in it.
4 Q. Is this the type of thing that you -- that it
5 would have been typical for you to receive in your
6 position at the FTC?
7 A. Yes.
8 Q. On the first page, it says, "The current FTC
9 methodology is not capable of measuring or predicting
10 actual smoker intake as of February 20, 1986"; you would
11 have agreed with that, wouldn't you?
12 A. Would I have agreed in 1986?
13 Q. Yes.
14 A. I would have had a qualified agreement.
15 Q. And what would the qualification have been?
16 A. In 1986, I think we still -- I'll agree -- I
17 think I'd agreed with it.
18 Q. Okay. Let me ask you to turn over to page 5.
19 And on page 5, it says, "The current FTC methodology does
20 not predict smoker intake because it does not mimic the
21 great variability of dynamic puffing conditions in
22 frequency that smokers experience"; would you have agreed
23 with that in 1986?
24 A. I would agree with that statement in isolation.
25 We were looking at changing the methodology to replicate
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1 the conditions of the amount of smoke that a smoker would
2 receive if he smoked exactly as the machine. But this
3 quote right there, I would agree with in isolation.
4 Q. Okay. And it further says, "It tells nothing
5 about the variable amount of the air dilution that occurs

6 in the mouth of each puff during free smoking, the
7 variable time of smoke holding in the mouth, and the
8 variable rates of leakage before inflation"; would you
9 have agreed with that in 1986?

10 A. Well, I wouldn't have had all of the facts at my
11 fingertips to be able to evaluate whether I agreed with
12 that in 1986 or not.

13 Q. Well, so, then, by providing you with this
14 information, Brown & Williamson might have been providing
15 the commission with information that it didn't already
16 have; is that correct?

17 A. This statement alone would have only been a
18 conclusion. The information that supported that would
19 have been very valuable.

20 Q. Okay. Do you know if Brown & Williamson was
21 ever requested to provide the information that supported
22 that?

23 A. If you mean by compulsory process, no.

24 Q. Well, were they informally requested?

25 A. You know, I can't remember everything we asked

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for during the proceeding.

2 Q. And do you know if, in fact, they did provide
3 any information to support that?

4 A. I do not remember seeing any studies about the
5 effect of air dilution -- well, on the air dilution that
6 occurs in the mouth; I mean, we got a lot of information
7 on how the actron filter produced a swirl in the mouth.

8 Q. Right.

9 A. And how that differed from -- that that had, we
10 were told, had to do with the taste. The variable time of
11 smoke holding in the mouth, I don't remember receiving any
12 information on how that affected intake or -- and the
13 variable rates of leakage during inhalation, I'm not sure
14 even sure I know what that means.

15 Q. Okay. I believe you said, before the break,
16 that Brown & Williamson criticized the FTC methodology yet
17 continued using it in its advertising, correct?

18 A. Correct.

19 Q. Now, at that time, all the other tobacco
20 companies were using the FTC methodology in their
21 advertising as well; weren't they?

22 A. Yes.

23 Q. And wouldn't you agree that if
24 Brown & Williamson had unilaterally discontinued using the
25 FTC methodology in its advertising, it would have been, in

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1 effect, competitive suicide compared to the other
2 companies?

3 A. Competitive suicide?

4 Q. Well, let me put it differently. It would have
5 put Brown & Williamson in a very bad competitive position
6 as to the other tobacco companies.

7 A. There's a lot that goes -- do you want a yes or
8 a no?

9 Q. I want your opinion.

10 A. Okay. It's not clear to me that including the
11 FTC legend, itself, or the so-called FTC legend, itself,
12 in advertising has much of an impact. I don't know if
13 consumers even see that. Certainly the advertising claims
14 made for products with low ratings has great impact upon

15 consumers.

16 Q. Well, then let me ask you this question. If
17 during this time when Brown & Williamson was providing the
18 commission with information critical of the testing
19 methodology, assume for me that all the other tobacco
20 companies, American, Philip Morris, Lorillard and
21 Reynolds, were, in at least some of their advertisements,
22 making statements about the cigarette being lighter, or
23 the cigarette being lower delivery, if Brown & Williamson
24 had refrained from doing any of that, that would have put
25 Brown & Williamson in a disadvantage, vis-a-vis the rest

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1 of the industry, wouldn't it?

2 A. If you're asking me if they stopped marketing or
3 advertising that they had products that were lower in tar,
4 would they be at a competitive disadvantage? I would
5 presume so.

6 Q. Okay. And so really, in order to -- if the
7 commission felt that advertising cigarettes as being lower
8 in delivery was false or deceptive or unfair, it would
9 have had to deal with this problem for the entire
10 industry, wouldn't it? It could not expect individual
11 tobacco companies to unilaterally abandon that kind of
12 advertising, could it?

13 A. Do you want --

14 Q. I want your answer.

15 A. Okay. There are three parts to that. There are
16 two ways that the commission can take care of a deceptive
17 problem. It can either sue one company, despite the fact
18 that that company will then be at an incredible
19 competitive disadvantage; even though the entire industry
20 is doing what this one company is, the idea being that if
21 they sue one company, the rest of them will get the
22 information and act accordingly.

23 Q. Right.

24 A. Sort of the -- Commissioner Bailey used to talk
25 about the cars that were speeding, if you pick out the

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1 first one, they don't have an excuse that everybody else
2 was doing it. So competitive disadvantage is not one of
3 the things that the commission considers in great detail
4 when it chooses how to proceed.

5 It can also do a trade regulation rule. The
6 commission would not have done a trade regulation rule on
7 low tar because of the FTC Improvement Act of 1980 which
8 set, as a requirement for trade regulation rules, a very
9 cumbersome process that required public hearings and
10 appeals.

11 And that after the FTC Improvement Act, nobody
12 really would do a Mag/Moss (ph) hearing, so that probably
13 would -- they could have sued every single member of the
14 industry, which is another thing they could have done,
15 taken the five major competitors and said You're all
16 advertising, and done that. So those are the two ways
17 that they could have gone forward.

18 On the other hand, you're asking about
19 competitive disadvantage. The commission's concern is
20 that a company not disseminate as, that they have no
21 substantiation for.

22 As far as the commission's ad substantiation
23 policy is concerned, if Brown & Williamson was

24 disseminating ads that they knew were false, because
25 they -- they knew that the procedure was invalid, then, in
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1 fact, that's a violation of the FTC Act. They could have
2 brought an action.

3 Q. Okay. But the FTC did not bring an action
4 against Brown & Williamson, notwithstanding the fact that
5 Brown & Williamson gave the FTC the information in these
6 two documents, and notwithstanding the fact that Brown &
7 Williamson continued advertising low delivery products,
8 right?

9 A. Yes, the -- the information that was provided
10 was an opinion, so it wouldn't have been good evidence in
11 court that Brown & Williamson failed to have
12 substantiation. It needed a little bit more than that.

13 Q. And I believe we've already established that the
14 FTC took no action to obtain more information through the
15 compulsory process; is that correct?

16 A. That's correct.

17 Q. Okay. Now, I take it you're not contending that
18 Brown & Williamson provided this information to you and
19 then continued to advertise low-delivery products, that it
20 was acting in bad faith in not putting itself at a
21 competitive disadvantage, vis-a-vis the rest of the
22 industry, by discontinuing this advertisement, you're not
23 contending they were --

24 A. I would actually contend that, yes.

25 Q. You would?

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1 A. Yes.

2 Q. Okay. Do you -- but you wouldn't contend that
3 the FTC acted in bad faith in not taking action that would
4 have resulted in the suspension of similar advertisements
5 for the entire industry?

6 A. I think they made bad judgment, but they did
7 make a judgment.

8 Q. So Brown & Williamson acted in bad faith, but
9 the commission just made a bad judgment, right?

10 A. Each had a different obligation under the law.

11 Q. Okay. And Brown & Williamson's obligation under
12 the law was to its shareholders, wasn't it?

13 A. I actually believe that a company has an
14 obligation, if it has information about its product that
15 is important to consumers' health, they do have an
16 obligation to tell consumers. And that that's just as
17 important as their obligation to their shareholders.

18 On the other hand, I recognize that most
19 companies don't believe that.

20 Q. Okay. Well, the FTC in fact, I think we've
21 established, knew since 1967 that the current FTC
22 methodology is not capable of measuring or predicting
23 actual smoker intake.

24 Now, is it your position then that in --

25 A. I didn't agree with that.

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1 Q. Okay.

2 A. No, because I don't know -- how much they knew
3 about intake versus smoking behavior in '67. Intake,
4 meaning what the body actually absorbs and the chemical
5 reactions and pharmacological reactions to that is

6 something I'm not aware that the commission was aware of
7 prior to late-'70s or early-'80s.

8 Q. Okay. But as of the late-'70s or early-'80s,
9 the commission was, in fact, aware that the current FTC
10 methodology is not capable of measuring or predicting
11 actual smoker intake, correct?

12 A. Correct.

13 Q. And didn't the FTC have an obligation to the
14 consumers at the time to inform them of that?

15 A. Government agencies have obligations to deal
16 with the information that they have at their disposal.
17 The Federal Trade Commission did not have sufficient -- it
18 felt -- the commissioners felt that they did not have
19 sufficient information to proceed with a legal action at
20 that time. Part of it, I told you I believe, was a result
21 of the fact that we could not get from the industry the
22 information necessary to make an adequate analysis.

23 The public health community clearly wanted
24 action taken, but all they could tell us was there was a
25 problem. They did not have the resources to do the type

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1 of testing to indicate to us, either, what the problem
2 fully was or what the solution was.

3 Q. And as we sit here today, do you have any
4 knowledge as to whether Brown & Williamson knew what the
5 solution to the problem was?

6 A. I have no knowledge whether they did or did not
7 know.

8 Q. Now, I think you said earlier that -- you can
9 correct me if I mischaracterize this, but when you came to
10 the FTC, it had somewhat limited resources to investigate
11 an area such as compensatory smoking by ventilation
12 blocking; did you say that?

13 A. I'm sorry; they had limited --

14 Q. Right. You talked about there was a chemist and
15 so forth?

16 A. Oh, what I meant by that, is that the Federal
17 Trade Commission is, in essence, a group of lawyers and
18 economists.

19 Q. Right.

20 A. And that really is their work force. I think
21 they have nationwide -- I mean, when I was there they had
22 a budget of under a billion dollars for the entire nation.
23 Half of that -- a third -- at least a third of that was in
24 competition, and some lesser percent in economics, and
25 then the last third in consumer protection.

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1 They had no real in-house capacity to do
2 scientific research; that was not their job. They were to
3 ensure a free and competitive marketplace, not a --

4 Q. Okay. But they did have, at least, some money
5 to hire expert consultants in the sciences, correct?

6 A. Some.

7 Q. I'll tell you what I am trying to figure out, in
8 the 1970s, in the mid-to-late-1970s, Martin Little, a guy
9 who didn't finish college, was able to figure out how to
10 block holes in a cigarette to get more smoke out of it, he
11 was able to figure out hole blocking, why couldn't the FTC
12 figure it out in the mid-'70s to the late-'70s; why could
13 a guy with his limited resources figure it out and the FTC
14 couldn't?

15 A. I don't know if the FTC could or could not have.
16 That was not an issue they were addressing. The FTC --
17 and that was the problem with the FTC doing the testing as
18 opposed to an agency that has the responsibility of
19 overseeing the public health.

20 The FTC was doing testing of cigarettes in the
21 same way in an earlier era that they had done testing of
22 flammable fabrics. Government tests are just that,
23 government tests. They set a standard, they're very good
24 at producing a standardized response to a standardized set
25 of stimuli; they don't look beyond that, unless it is

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brought to their attention.

Q. Well, you would agree with me that it, you know, it doesn't take a Ph.D. to figure out that if there are holes in a cigarette, you can put your fingers over those holes and get a higher concentration of smoke; does it?

A. You know, the information that we got in '83, when we started looking at this, was that consumers knew the holes were there, but did not understand that if they covered them, they got anything better than just a better test. They did not know that they were increasing their intake of tar and nicotine.

MR. HOFFMANN: Okay. Move to strike as nonresponsive.

BY MR. HOFFMANN:

Q. My question was, it doesn't take a Ph.D. to figure out that you can get a higher concentration of smoke by blocking those ventilation holes, does it?

A. And all I'm answering is from what I knew, from what I saw from the data, which was that people knew they got better test, they did not know -- so maybe it does take a Ph.D.

Q. Okay. Well, was there -- is there -- did the FTC collect -- do consumer surveys or something like that to get that data?

A. At that time?

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Q. Yeah.

A. No, we looked at studies that had been done mainly by Dr. Kozlowski, and I think there may have been others at the time as well, who asked consumers about hole blocking.

Q. I want to ask you a couple of questions about the 1979 Surgeon General's Report, and I think some excerpts of it may already have been introduced, but at the risk of duplication, I'm going to mark and hand you some other excerpts to save time.

(DFT. EXH. 116, "Smoking and Health," a report of the Surgeon General, was marked for identification.)

BY MR. HOFFMANN:

Q. Let me show you what's been marked as Exhibit 116. Let me ask you to look at page small Roman numeral xiii. And I'd particularly like for you look at the last paragraph -- it's actually not the last full paragraph, but the paragraph at the very bottom of that page. That paragraph in the '79 Surgeon General's Report recognizes the phenomenon of compensatory smoking, doesn't it?

A. Yes. It recognizes and indicates, "Interpretations of these studies is complicated, however,

24 by our lack of understanding what the motives and
25 circumstances of why people switch."

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1 Q. Okay.

2 A. They were beginning to develop information that
3 raised questions.

4 Q. Then I would like you to look at the next page,
5 and there the '79 Surgeon General's Report, near the
6 bottom of the page, but above the subject heading for
7 public policy says, "Consumers should be advised to
8 consider not only the level of tar and nicotine, but also,
9 when information becomes available, levels of other
10 tobacco smoke constituents including carbon monoxide.
11 They should be warned that in shifting to a less hazardous
12 cigarette, they may, in fact, increase their hazard if
13 they begin smoking more cigarettes or inhale more deeply.
14 And most of all, they should be cautioned that even the
15 lowest yield of cigarettes presents health hazards very
16 much higher than what they had encountered if they smoked
17 no cigarettes at all. And that the single most effective
18 way to reduce the hazards associated with smoking is to
19 quit."

20 In 1979 and in that time frame, the years
21 immediately following, to your knowledge, what was done to
22 warn consumers as set forth in that paragraph?

23 A. As I said, I didn't take over the tobacco
24 program until '83. And I gave up smoking in 1968, so
25 between 1968 and 1983, I was just like everybody else.

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1 Q. Okay. Well, after 1983, was --

2 A. Okay.

3 Q. -- anything done to warn the public of the topic
4 set forth in that paragraph?

5 A. I know that the Office on Smoking and Health
6 probably had information that they made available,
7 certainly the Surgeon General's Reports. I don't know
8 what type of educational materials they made available
9 and/or what type of advertising that they did or PSAs and
10 other kinds.

11 I do know that in 1983, following the Barclay
12 matter and what I consider to be the failure of our
13 Federal Register notice to get the adequate kind of
14 information necessary to make a -- make a modification,
15 that I recommended to the bureau director that the FDA --
16 the FTC, excuse me, that the FTC do information and
17 education on the use and misuse of low-tar products. And,
18 in fact, with the help of Dr. Kozlowski, we developed some
19 materials.

20 This was the period, if I'm not mistaken, when
21 Jim Miller was chairman of the Federal Trade Commission.
22 And that was the period of less government is better than
23 more government. And the response I had from the bureau
24 director was that the Federal Trade Commission was not an
25 agency whose jurisdiction included health and safety. It

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1 only included the assurance of a fair marketplace, and
2 therefore was not in our jurisdiction.

3 I did ask, repeatedly, of the Office on Smoking
4 and Health what they were doing, and as I say, they were
5 doing something, but they had a very small budget in those

6 years.

7 Q. Okay. Well, going down to the next paragraph,
8 it says, "The decision to smoke is a personal decision.
9 But once this is said, it remains unquestionably the
10 responsibility of health officials to ensure that smokers
11 and potential smokers are adequately informed of the
12 hazards."

13 Do you agree with that, that it's unquestionably
14 the responsibility of health officials to ensure that
15 smokers and potential smokers are adequately informed of
16 the hazards?

17 A. Yes, I also believe they should have proper
18 funding.

19 Q. Then it goes on to say that, "This is especially
20 true in a society where hundreds of millions of dollars
21 are spent each year in promoting cigarettes and where
22 these and many other influences are encouraging young
23 people to take up smoking."

24 Then it says, "The consideration of what is
25 meant by adequately informed is a scientific and public

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1 health policy problem." Do you agree with the
2 consideration of what is meant by "adequately informed as
3 a scientific and public health policy problem"?

4 A. I believe that "adequately informed" is probably
5 a scientific question, in the sense that people with
6 expertise in the area should be consulted.

7 Whether it should be a public health policy
8 problem, or is a public health problem depends on who is
9 in control of the government at that time.

10 Q. It depends on who's making the public policy, I
11 guess?

12 A. That's absolutely right.

13 Q. And this was 1979. Julius Richmond was the
14 Surgeon General. In 1979, do you know what was done to,
15 quote, adequately inform the public of the public health
16 problem of low-tar cigarettes?

17 A. I have two constraints for 1979. I was living
18 abroad.

19 Q. Okay.

20 A. And I was -- so I was not in this country, and I
21 certainly was not involved in what was going on with
22 public health.

23 Q. And as an expert in tobacco product regulation,
24 you have not gone back and researched what was happening
25 during that time?

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1 A. You mean, as to what sorts of information were
2 being provided to the public at that time?

3 Q. Right.

4 A. I might have looked at what some of the
5 materials were that the Office on Smoking and Health had
6 when I first started looking at the Barclay matter, just
7 to educate myself, but I don't have an in-depth knowledge
8 of what they were or were not doing.

9 Q. Well, going back to the question that we posed
10 earlier this morning about the scope of your expertise,
11 and in light of the fact that you've qualified a couple of
12 answers by when you quit smoking and when you were out of
13 the country and when you started back with the FTC, would
14 it be fair to say that you are an expert in the regulation

15 of tobacco products from 1983 to the present?

16 A. That would certainly be the area of my most
17 explicit knowledge.

18 Q. And would it be fair to say that you are not an
19 expert in the regulation of tobacco products prior to
20 1983?

21 A. I don't have any personal knowledge of what went
22 on before 1983.

23 Q. And you haven't undertaken in any kind of
24 thorough-going fashion to research what went on prior to
25 1983, have you?

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1 A. The entire area of smoking control and
2 regulation? No, there would have been areas in which I
3 would have gone back and done research in a specific
4 matter that was either before the commission or the Food
5 and Drug Administration, but other than that, no.

6 Q. For purposes of formulating your expert opinions
7 to be given in the trial of this case, you have not gone
8 back in any kind of thorough-going fashion and researched
9 tobacco regulation prior to 1983, have you?

10 A. For this -- for this purpose?

11 Q. For this lawsuit.

12 A. No.

13 Q. Okay. In your opinion, do you believe that the
14 Public Health Service should have warned consumers about
15 compensatory smoking as early as 1980?

16 A. I don't know whether they did or didn't.

17 Q. Should they have?

18 A. Should they have warned? They should have made
19 information -- they could have made information -- I don't
20 know what the Office on Smoking and Health knew at that
21 time or how well funded it was. So it would be hard for
22 me to say what they should have done.

23 Q. Well, is there any point in time where you are
24 of the opinion that the Public Health Service should have
25 warned smokers about compensatory smoking?

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1 A. To this day, the public health community is
2 struggling with how best convey the information about
3 compensatory smoking. One, because of incomplete
4 information on the part of the public health community.
5 And, secondly, with the difficulty of conveying the
6 message that how you use the product may or may not
7 influence your intake.

8 It's very hard to get that message across
9 with -- with -- at the same time saying, Of course, you
10 shouldn't smoke at all. It's a very tricky message to
11 convey that -- it almost is a license-to-smoke message.
12 And I know that's given the people in the area a lot of
13 difficulty.

14 Q. And wouldn't it be true that because it's almost
15 a license-to-smoke message, the tobacco companies should
16 not undertake to determine on their own what kind of
17 warnings should be given about compensation and make such
18 a warning?

19 A. I think if the tobacco companies want to use the
20 numbers and that they know the numbers mislead consumers
21 about their intake, they did have an obligation to do
22 that.

23 I'm trying to remember the name of the product

24 that was developed -- I'm not sure if it was Reynolds
25 product or another product -- it had a moveable filter,
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1 and you could dial your level of tar. And it was a
2 product in which the company actually informed consumers
3 how to increase and decrease their intake. So the
4 companies knew how to do it if they wanted to.

5 Q. Well, let me ask you this, though, if it's a
6 very tricky and difficult message for the Public Health
7 Service to figure out how to convey, isn't it a very
8 difficult message for the tobacco companies to figure out
9 how to convey?

10 A. No, because as far as I understand, the tobacco
11 companies want you to smoke. The public health community
12 does not want anybody to smoke. They believe the only way
13 to get rid of the death and disease associated with
14 smoking is to quit. So, therefore, to give a message that
15 says "smoke it this way" is a "you should smoke message."

16 All of tobacco advertising is to sell
17 cigarettes. If it's to sell cigarettes, then you want
18 people to smoke. So it's not the same difficulty. It's,
19 in fact, very consistent with the message that the tobacco
20 companies are trying to give, along with the caveat about
21 the proper use of the product.

22 Q. Well, isn't it -- I mean, if what adequately
23 informs consumers is a public policy question, is it your
24 position that notwithstanding the fact that it's a public
25 policy question, that tobacco companies should decide how

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1 that information to adequately inform consumers should be
2 conveyed?

3 A. A piece of information can be more than one
4 thing. There is a public policy question here that the
5 Public Health Service clearly has to address
6 scientifically, and perhaps as a communications issue.

7 But from the point of view of a company that's
8 selling a product, it has an obligation, at least under
9 the Federal Trade Commission Act, to not only not deceive
10 consumers explicitly or implicitly, but also an obligation
11 not to omit information that would be important to
12 consumers either in the light of a representation that was
13 made or in light of information that consumers need to use
14 the product.

15 So under those circumstance, I think that the
16 companies really did have an obligation to make it clear
17 to consumers the limitations of the products, at least in
18 the advertising that talked about the low-tar products.

19 Q. So do you believe the tobacco companies were
20 negligent in failing to warn consumers about compensation?

21 A. You know, the Federal Trade Commission Act
22 doesn't speak about negligence, it talks about deception.
23 So I think it was deceptive, yes.

24 Q. Okay. And at what point in time did it become
25 deceptive?

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1 A. From the point in time whenever the companies
2 knew or had reason to believe that the numbers and the
3 claims they were making were deceptive.

4 Q. And do you know what point in time that was?
5 A. Absolutely what point? No. It sounds to me,

6 though, that Brown & Williamson at least knew by 1983, if
7 not before, that the test was seriously flawed.

8 Q. And what should the tobacco companies have said
9 in this warning?

10 A. I'd hate to design a warning on the spot, but it
11 could have, at a minimum, at that time in 1983, the amount
12 of tar -- the amount of tar and other substances that you
13 ingest are dependent upon the manner in which you smoke.
14 If you smoke more cigarettes, if you take more puffs, if
15 you inhale more deeply, if you -- and on and on. Instead
16 of making the holes invisible, put red circles around the
17 holes. There's lot of different ways that the companies,
18 could have indicated to consumers that how they smoked
19 definitely influenced their intake.

20 Q. Do you think this message should have been
21 printed on a cigarette package?

22 A. To be printed on the cigarette packages, it
23 would have had to have been voluntarily done by the
24 company, since the government couldn't mandate that,
25 probably.

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1 Q. Uh-huh.

2 A. I mean, I don't --

3 Q. Would that --

4 A. You're talking about voluntary --

5 Q. The entire context of this question is
6 voluntarily by the company, isn't it?

7 A. Well, I think usage -- proper usage -- proper
8 usage instructions I think are very important for any
9 product, particularly a consumer product that has a health
10 risk associated with it.

11 Had the FDA been successful in its assertion of
12 jurisdiction, certainly instructions for use could have
13 been included in something inside of the package.

14 Q. So it's your position, then, that one of the
15 things that the tobacco companies did wrong is not
16 including in the package a warning about compensation?

17 A. Correct, usage.

18 Q. Your CV that you've attached to your disclosure
19 here says that you, I'm quoting now, "formulated and
20 initiated major policies regarding the industry's
21 marketing and advertising practices, low-tar policy,
22 health warning for cigarette and smokeless tobacco."

23 Did you ever initiate a policy concerning
24 warnings for compensation?

25 A. Yeah.

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1 Q. Okay.

2 A. I told you the bureau director turned me down.

3 Q. All right.

4 A. I had gone as far as hiring a consultant,
5 designing a campaign, coming up with information that we
6 thought would be useful.

7 Q. Right. And was this discussed yesterday?

8 A. I don't know; I assume so. Did we discuss that
9 yesterday? I know we discussed it, perhaps, the first
10 day.

11 MS. PARKER: (Moves head up and down.)

12 BY MR. HOFFMANN:

13 Q. Okay. And the bureau director turned you down?

14 A. Indeed.

15 Q. And who is he?
16 A. You know, I'm embarrassed by my memory lapses.
17 I don't know who was bureau director at that particular
18 time. Jim Miller was chairman, certainly.

19 Q. Okay. Well, if you don't know, you don't know.
20 Who was the -- what did the warning about
21 compensation say that was turned down?

22 A. Well, I told you I thought it was a very tricky
23 issue to try to come up with a piece of material that
24 could be useful to consumers that would not convey a
25 smoking message.

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1 So I wanted to say something about, there is no
2 safe product, the Surgeon General has indicated -- perhaps
3 go through the forewarnings or at least the salient parts
4 of the forewarnings. And then say that if you continue to
5 smoke and you're using these products, the intake you get
6 will be dependent upon -- and then the conditions.

7 We were going to have a color chart, you know,
8 the -- I think it's Dr. Kozlowski's color chart which has
9 the bull's eye --

10 Q. Right.

11 A. -- and the scatter pattern.

12 I wasn't sure that this was necessarily the best
13 way, but I wanted to get a first thing on the table for
14 discussion purposes. That was as far as it got.

15 He had developed something very similar for
16 Canada, so that we had -- we already had some, you know,
17 sort of paradigmatic examples of how this could occur.

18 Q. And when did you do this?

19 A. I can't give you the exact year. I knew it
20 would have been after 1983. It was -- it had to have
21 probably been after the failure of the Federal Register
22 notice, but I really can't tell you exactly when during
23 that period in the mid-80s.

24 Q. Do you know if it was before the 1985
25 Scarborough conference?

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1 A. The Scarborough conference was in 1983.

2 Q. That's right. It was published in '85.

3 A. It was after the Scarborough conference.

4 Q. Okay. Do you know if it was after the Lancet
5 article about the Scarborough conference?

6 A. Actually, when I was getting that together, I
7 hadn't known that the article wasn't published until 1985
8 when I had been using the different publications, so I
9 really don't know how -- what its relationship was to this
10 publication.

11 The publication was the result of the work of
12 the English participants in that conference. And so a lot
13 of the publication and information about it went on in
14 England.

15 Q. Okay. Let's turn to the Scarborough conference
16 for a minute. I think --

17 MR. YARBER: Exhibit 8.

18 BY MR. HOFFMANN:

19 Q. Exhibit 8. Looking at the first two sentences,
20 "An international workshop was held to consider whether
21 the policy adopted in many countries to encourage the
22 decline in cigarette tar yields was beneficial. The
23 consensus was that the policy had been beneficial and that

24 tar yields should be further reduced."

25 Now at the time the participants of the
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1 conference reached that consensus, they were aware that
2 one of the ways in which tar yields were reduced was by
3 ventilation holes, weren't they?

4 A. Yes.

5 Q. If you'll look at, also on the first page,
6 second column, under the heading Lung Cancer, three or
7 four lines down, four or five lines down, it says, "One
8 cause of uncertainty involves compensatory smoking, the
9 tendency of smokers to increase the amount of smoke
10 inhaled from a cigarette of low-tar and yield to a lesser
11 extent to increase the number of cigarettes smoked.
12 Several studies in which the intact of carbon monoxide or
13 nicotine have been used as an indirect measure of tar
14 exposure have found that the estimated reduction in tar
15 intake is only about half of what might be expected from
16 the difference in cigarette tar yields."

17 Now, the question I have about that, I guess, is
18 pretty much a mathematical question. If that's true and
19 if a smoker goes from a 20-milligram-delivery tar product
20 to a 1-milligram product, that smoker is not going to get
19 milligrams less tar, correct?

22 A. Take a 20-milligram product down to a --
23 Q. To a 1 milligram product, which would be a 19 --
24 A. Yeah.
25 Q. He's not going to get 19, typically not?

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1 A. No. If he smokes exactly like the machine,
2 maybe.
3 Q. Okay. But according to these studies, the
4 estimated reduction in tar is only about half what might
5 be expected from the machine. So that being the case, if
6 a smoker went from a 20-milligram product to a 1-milligram
7 product, that smoker would get about 9 milligrams or 9 and
8 a half milligrams less tar from the 1-milligram product
9 than the 20-milligram product, correct?
10 A. It would depend on how much they got -- how much
11 intake they got from the 20-milligram.
12 Q. Okay. But I'm just talking about what these
13 studies show, according to these studies, --
14 A. I know there are studies --
15 Q. -- that would be the result?
16 A. There are studies that show different numbers as
17 well.
18 Q. I'm asking you about these.
19 A. You know, I can only say that that's what the
20 article said.
21 Q. Okay.
22 A. I was there to report on the Barclay matter.
23 That was the area of which I felt comfortable.
24 Q. All right.
25 A. The interesting thing about that result --

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1 Q. Let's use our time to answer my questions.
2 A. Okay.
3 Q. If you'll turn to the next page and look at the
4 second column, near the bottom of the page, but above the
5 heading that says "Possibility that cigarette

6 engineering," it says --

7 A. On the right or the left?

8 Q. I'm sorry; on the right. It begins, "The
9 importance of compensatory smoking."

10 A. Okay.

11 Q. "The importance of compensatory smoking should
12 not be overemphasized. Even if further reductions in tar
13 yields produce proportionately less benefit, any benefit
14 would be worthwhile. Concerns that a lower tar policy
15 will encourage smoking do not seem to be well-grounded,
16 and tar reduction programs may actually help people to
17 give up smoking.

18 In both the United States and the UK, which have
19 been active tar reduction program -- which have active tar
20 reduction programs, there have been notable reductions, in
21 general smoking rates in cigarette consumption.

22 In the American Cancer Society survey, people
23 who had switched to lower tar cigarettes at the start of
24 the study were more likely to have become ex-smokers by
25 the end, irrespective of the number of cigarettes

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1 originally smoked."

2 Now, my question about that is, doesn't that
3 provide a rationale for not warning smokers about
4 compensatory smoking?

5 A. Quite to the contrary.

6 Q. So your -- in your view, that would provide a
7 rationale for warning smokers about compensatory smoking?

8 A. Well, it certainly wouldn't be contrary to the
9 warning.

10 Q. Isn't there some danger that if smokers are
11 warned about compensatory smoking, they might simply
12 choose to stay with their higher-tar brands?

13 A. No, I think if the consumers are told -- and
14 this was another thing the public health community fretted
15 about, which is that if consumers are told that if you use
16 the product in such a way, you'll achieve more of the
17 low-tar reduction, that that would indeed, in fact, give
18 them more confidence that their product could be useful.

19 So far from being a detriment, I don't -- I
20 don't know -- you know, we don't have consumer research to
21 show how they would have reacted or not. However, there
22 would have been information that they could have used to
23 moderate their behavior.

24 Q. All right. As we sit here today --

25 THE DEPONENT: Can I just ask one

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1 question?

2 MR. HOFFMANN: Yeah.

3 THE DEPONENT: Is the air on in here?

4 MR. HOFFMANN: It's gotten pretty warm.

5 THE DEPONENT: It's very stuffy, and I'm
6 beginning to not be able to breathe.

7 Thanks.

8 BY MR. HOFFMANN:

9 Q. As we sit here today, are you aware of any
10 information that the American Tobacco Company had about
11 the phenomenon of compensation at any point in time that
12 one couldn't have learned -- well, let me strike that and
13 ask a different question.

14 Are you aware of any scientific information

15 about the phenomena of compensation that the American
16 Tobacco Company had that one could not find by researching
17 the published literature on the area of compensation?
18

A. I'm not either aware or not aware.

19 Q. Okay. And if I ask you that same question for
20 the other tobacco companies, would your answer be the
21 same?

22 A. I have not searched the documents.

23 Q. Okay. Do you have any evidence that when the
24 American Tobacco Company introduced Carlton cigarettes, it
25 knew that it might not be safer than other brands?

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1 A. Do I have evidence of that?

2 Q. Right.

3 A. No.

4 Q. Okay. In your opinion, when the American
5 Tobacco Company introduced Carlton, did it do anything
6 wrong?

7 A. Did it do anything wrong? I don't know when
8 Carlton was introduced.

9 Q. 1964.

10 A. 1964; did it do anything wrong? Morally,
11 legally, ethically?

12 Q. Well, let's start with legally.

13 A. Legally, no.

14 Q. How about -- well, I don't know what the
15 distinction is between ethically and morally.

16 A. I think it's more morally.

17 Q. All right. How about morally?

18 A. I happen to believe that selling a product that
19 you know kills people is morally wrong.

20 Q. So simply by continuing -- by not going out of
21 the business, they were doing something immoral, in your
22 view?

23 A. Again, since I don't know what they knew in 1964
24 about the low-tar products, and I presume that Carlton was
25 ventilated in '64 as opposed to being just more heavily

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1 filtered, it's hard for me to make an assessment of what
2 was going on.

3 Q. Okay. That's fine. But let me go back and
4 explore that other answer. You believe simply selling
5 cigarettes is immoral, correct?

6 A. I think that's perhaps strong. I think that it
7 is -- it's not something I would do. I don't -- I don't
8 want to make moral judgments about what other people
9 should do. As far as I'm concerned, it's something I
10 couldn't do.

11 Q. Well, I -- but you did say earlier in this
12 deposition that simply by selling cigarettes, the American
13 Tobacco Company is acting immorally, didn't you?

14 A. I did.

15 Q. Okay.

16 VIDEOGRAPHER: Counsel, can we go off
17 the record to change tapes please, sir?

18 MR. HOFFMANN: Sure.

19 VIDEOGRAPHER: Off the record at
20 approximately 11:48.

21 (Off the record.)

22 VIDEOGRAPHER: Back on the record at
23 approximately 12:16.

24 BY MR. HOFFMANN:

25 Q. I want to ask you some questions about the
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1 Barclay litigation now. The Barclay litigation ultimately
2 resulted in a District Court opinion by Judge Gasell, and
3 then by an opinion from the Court of Appeals for the
4 District of Columbia Circuit that was written by Judge
5 Bork, as I recall; isn't that correct?

6 A. That is my recollection.

7 Q. And those opinions set forth the history of the
8 case and the allegations of the parties and the evidence
9 that was adduced by the parties, don't they?

10 A. You mean completely? I don't think completely,
11 but --

12 Q. Not completely.

13 A. But they stand for what the case is now.

14 Q. Okay. And the opinion of the District of
15 Columbia Circuit deposed of all of the issues in that
16 case, and that was not further appealed to the United
17 States Supreme Court, right?

18 A. That's correct.

19 Q. I guess my question is this: As an expert
20 witness, what do you think you can tell the jury about the
21 Barclay litigation that would be relevant and admissible
22 that one cannot learn by reading those two opinions?

23 MR. PATRICK: I'm going to object to the
24 question as being overly broad, but if you can
25 answer that...

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1 THE DEPONENT: I guess I would have to go
2 back to what I had said originally about the
3 commission's processes that led up to that what
4 the commission learned during that period, the
5 state of the commission's knowledge regarding its
6 testing procedure.

7 You know, if the question in the trial, and I
8 don't want to presume to say I know much about
9 this case, but if the question in the trial has to
10 do with whether a consumer should have known or
11 did know about the proper use of these products,
12 what kind of information may or may not have been
13 available, then I can certainly explain the
14 government's role in either providing or not
15 providing information. And the Barclay
16 controversy is part of that -- is part of that
17 equation.

18 Similarly, in the question is what
19 Brown & Williamson knew in 1983, that's in the
20 documents, but I think I can flesh it out.

21 BY MR. HOFFMANN:

22 Q. Okay. Well, would you flesh it out for me?

23 A. I think we've already talked about it, that
24 Brown & Williamson said --

25 Q. Okay.

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1 A. I mean, there's -- we can go on and on, but, I
2 mean, I think the major thing is that Brown & Williamson
3 knew that the system did not produce meaningful
4 information.

5 Q. So would it be fair to say that you've already

6 told us, in this deposition, you've already offered for us
7 all the opinions that you have about the Barclay case?

8 A. I doubt it.

9 Q. All right. Can you think of any that you have
10 about it that you haven't offered?

11 A. You know, I think -- can I think about what I
12 might offer? I don't know if I had to have thought about
13 that by now, and so I guess I could say I haven't thought
14 about that, about all the things I could have offered. I
15 mean, I know that I have information that the law firm
16 found useful in this area. And...

17 Q. By "the law firm," you mean Ness, Motley?

18 A. Yes.

19 Q. Well, what -- tell me what information you gave
20 the Ness, Motley law firm in this area that you haven't
21 already testified about in these two days of depositions?

22 MR. PATRICK: Well, again, I'd object to
23 the overly broad proceed of the question.

24 There was extensive testimony yesterday about
25 the Barclay case and some today, and I'm not sure

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1 if the witness can piece all of that together and
2 then determine what she might have to offer that
3 hasn't already been offered. But if she can do
4 that, she's -- certainly can answer questions.

5 MR. HOFFMANN: That's all I'm asking.

6 THE DEONENT: Well, I mean, -- I could just
7 start talking again. I don't know how useful that
8 is.

9 BY MR. HOFFMANN:

10 Q. Not if you're going to say things that you've
11 already said.

12 A. I don't know if I've already said them. I mean,
13 I would prefer to answer questions.

14 Q. Okay. I understand.

15 A. Okay.

16 Q. All right. Your statement of opinions say,
17 "Ms. Wilkenfeld is expected to testify as follows: The 1
18 milligram and 99 percent tar-free series of advertisements
19 for Barclay brand cigarettes was found to be deceptive by
20 the FTC staff and commissioners and the United States
21 District Court for the District of Columbia."

22 Now, I understand that you now agree that the 99
23 percent tar-free was not found to be deceptive by the
24 Court, correct?

25 A. Not by the Court, that's correct.

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1 Q. All right. But insofar as your -- well, first
2 of all, that's not a statement of opinion, is it; that's a
3 statement of fact. What the FTC staff and commissioners,
4 the United States District Court found is a --

5 A. Right.

6 Q. -- question of fact. And certainly we can
7 determine what the United States District Court found by
8 reading the opinion; we don't have to hear your testimony
9 to be informed about that; do we?

10 A. Not for the United States District Court
11 opinion.

12 Q. Okay.

13 A. I can flesh out the decision-making process that
14 led to the commission's decision on the 1 milligram tar

15 and the 99 percent tar-free.

16 Q. Okay. And you've already done that in these two
17 days of deposition?

18 A. I've certainly done some of it.

19 Q. Okay. Did -- in your opinion -- or do you
20 intend to offer the opinion that Brown & Williamson and
21 its lawyers behaved improperly in the way they conducted
22 the Barclay litigation?

23 A. Could you say that again?

24 Q. Do you intend to offer the opinion that
25 Brown & Williamson or its lawyers behaved improperly in

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1 the way they conducted the Barclay litigation?

2 A. Just in the conduct of the litigation?

3 Q. Yes.

4 A. No.

5 Q. And do you intend to offer the opinion that
6 Brown & Williamson somehow defrauded the Court and for
7 that reason, the Court's decision was wrong in the Barclay
8 litigation?

9 A. No.

10 (DFT. EXH. 117, Excerpt from B&W

11 Submission to FTC, was marked for

12 identification.)

13 BY MR. HOFFMANN:

14 Q. I want to show you what's been marked as, I'm
15 sorry, Exhibit 117. And this is an excerpt from a
16 submission to the Federal Trade Commission on behalf of
17 Brown & Williamson by the Paul, Weiss Law Firm. And on
18 the second page it's excerpted there, it says, "Logically
19 to evaluate and understanding the answers given by the FTC
20 consultants, one must know the questions. Remarkably, the
21 staff has thus far refused to tell us what and when the
22 scientists were asked. While we do not know what
23 questions the FTC posed to these consultants, we can
24 ascertain from their reports their failure to agree on
25 what the Barclay issue is."

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1 Do you know if the FTC ever agreed to tell the
2 lawyers for Brown & Williamson what and when the
3 scientists, the consulting scientists were asked?

4 A. I don't know the answer to that question. I
5 don't know if this is a valid complaint or not.

6 Q. Okay. Can you tell me --

7 A. I would be surprised if it were a valid
8 complaint.

9 Q. Okay. Can you tell me the names of the
10 consultants the FTC used in the Barclay case?

11 A. Dr. Lynn Kozlowski, Dr. Michael Guerin, Michael
12 Guerin, and Fred Bock, Dr. Fred Bock, and Mike.

13 Q. Can you tell me the questions that were posed to
14 these consultants?

15 A. I'd have to look that up. I was not responsible
16 for that part of the investigation, and I'm sure I read it
17 at one time. I know it's in the files. That's why I'm
18 surprised that Brown & Williamson made this complaint, but
19 without going back through the files, I couldn't tell you
20 exactly the questions they were asked.

21 Q. Are the documents in which you would look that
22 up included in the reliance documents that you have
23 produced in this litigation?

24 A. Are they? I know the law firm requested
25 documents from the Federal Trade Commission on the
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1 Brown & Williamson litigation. I know some were
2 produced -- I was unimpressed by what was produced. It
3 seemed to be remarkably -- I kept really good control of
4 those files, and they seem to have lost them. So I would
5 have to go back and look through them to see if that is in
6 what was produced.

7 Q. But my question is, did you produce, as part of
8 your reliance documents in this litigation, pursuant to
9 the Notice Duces Tecum, the documents that you would have
10 to look at to answer this question about what questions
11 were posed to the FTC consultants?

12 A. And my answer is, I'm not sure. I produced
13 everything that they provided me with, that the FTC
14 provided them with about Brown & Williamson.

15 As I said, I don't remember whether that
16 question was answered in the documents that I looked
17 through. It was certainly not something I was looking for
18 when I was reading through the documents.

19 Q. Okay. Well, then, would it be fair to say that
20 in preparation for your opinions in this lawsuit, you have
21 not gone back and determined what questions were posed to
22 the FTC consultants in the Barclay litigation?

23 A. I have certainly not gone back and looked for
24 the answers to the question proposed on page 2 of this
25 submission. I went back to refresh my recollection of

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1 what the issues were, but as to what specific questions
2 were asked, I may or may not have seen it; I don't know.

3 Q. Okay. Did the FTC have any consumer surveys
4 conducted with regard to Barclay in connection with the
5 Barclay litigation?

6 A. Yes.

7 Q. Were those produced to Brown & Williamson's
8 attorneys?

9 A. I know they were certainly introduced at trial.
10 Whether we -- I don't think we would have given them -- it
11 is not the Federal Trade Commission's policy to give its
12 evidence to companies prior to litigation.

13 Q. Were there any consumer surveys conducted with
14 regard to Barclay that were not introduced at trial?

15 A. I don't think so; certainly not by the Federal
16 Trade Commission. As I say, there was this one that we
17 had relied on, results, that Philip Morris had produced,
18 and then it was not forthcoming for either us or the
19 Court.

20 Q. Have you gone back and reviewed the consumer
21 surveys that were conducted for the FTC in connection with
22 the Barclay trial?

23 A. I'm pretty sure that those were not provided to
24 me by the results of the FOIA request.

25 COURT REPORTER: By the what?

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1 THE DEPONENT: By the FOIA; it's capital
2 F-O-I-A.

3 BY MR. HOFFMANN:
4 Q. So then, obviously, you haven't reviewed them?
5 A. No.

6 Q. Okay. Can you think of any other material --
7 well, in offering opinions about the Barclay litigation,
8 would it be useful for you to review those consumer
9 surveys?

10 A. If they were available, it would be useful.

11 Q. Okay. Can --

12 A. Useful to a certain extent, just as far as the
13 results are concerned.

14 As far as the methodology, defense of these
15 surveys as proper, I'm -- would need a -- you know, I
16 would rely on the expert opinion of Dr. Popper who
17 testified for us on that issue.

18 Q. Doctor?

19 A. Oh, I'm sorry; can you -- the question you asked
20 me on who did we retain?

21 Q. Right.

22 A. I gave you the name of the three consultants who
23 were retained by the commission to do the investigation
24 that led to the commission's decision.

25 Once we went to trial, we then hired an
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1 additional consultant, who is not -- who is not part of
2 that initial investigation -- well, no, I'm sorry, we
3 didn't hire him; he was on staff. His name was
4 Dr. Edward -- Ed Popper, P-o-p-p-e-r.

5 Q. Okay.

6 A. And he was a visiting scholar, at that time he
7 was on staff, and he oversaw the copy test.

8 Q. In preparation of giving your opinions in this
9 case, have you discussed the Barclay litigation with
10 Dr. Popper?

11 A. No.

12 Q. Have you, in preparation of giving your opinions
13 in this case, have you discussed the Barclay litigation
14 with any of the experts you retained in that case?

15 A. Not in anticipation of this; we have had
16 conversations over the years.

17 Q. Lynn, for example, you've had conversations
18 with?

19 A. Oh, yes, I will refer to him as Dr. Kozlowski
20 from now on, and probably Dr. Guerin as well.

21 Q. All right. Other than these consumer surveys
22 that we just discussed, can you think of any other
23 documents that would be useful for you to review from the
24 Barclay litigation in connection with your opinions in
25 this case, that you haven't been able to get from the FTC?

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1 A. Can I think of others? I can go through the
2 index and see.

3 Q. Do you have the index?

4 A. Yes. I think we have, what? Wally Snyder's
5 Affidavit with the attached index?

6 Q. Okay. Can you find that?

7 MR. YARBER: It's Exhibit 98.

8 MR. HOFFMANN: Can I borrow y'all's copy?

9 THE DEPONENT: To review this properly, I
10 would have to cross-check these against the ones
11 that I have.

12 Well, I guess we have a complete
13 understanding, I would have liked everything that
14 had been attached to this Affidavit and not just

15 the ones that they were able to produce.

16 BY MR. HOFFMANN:

17 Q. All right. Well, what -- what percentage -- can
18 you estimate what percentage of the materials set forth in
19 this Affidavit was, in fact, produced?

20 A. No, I don't think I can estimate the percentage.

21 How high was the pile? You know, and --

22 MR. PATRICK: It wasn't much.

23 THE DEPONENT: Yeah. I mean, truthfully, the
24 amount of material we amassed, you know, filled up
25 a room. Whether any or all of it would be useful

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1 to my direct testimony, I can't say, because I
2 like to be completely prepared. And you're asking
3 me what I would do if I wanted to be completely
4 prepared; I would like to have the whole file.

5 BY MR. HOFFMANN:

6 Q. Okay. And I guess you can't say whether a
7 particular document would be useful until you've read that
8 document to determine whether it's useful, right?

9 A. Right.

10 Q. Well, can you -- there are 93 items here. Can
11 you just sit here and read through them to yourself, and
12 having done that, give me an estimate of what percentage
13 of them were produced?

14 A. Probably not.

15 Q. So then it would be fair to say you really don't
16 have any idea of what percentage of the FTC file in the
17 Barclay case was produced for you to review in connection
18 with the Little case?

19 A. I'd say it was certainly less than half,
20 certainly -- probably -- well, what I would have liked to
21 have gotten -- it was certainly less than a quarter of
22 everything that they had. It was certainly less than a
23 half of everything that would have been public.

24 Q. Okay. In paragraph 7 of your disclosure, it
25 says, "Ms. Wilkenfeld may be asked to comment about

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1 publicly available documents concerning the FTC's
2 investigation of Barclay cigarette advertising"?

3 A. Uh-huh.

4 Q. And then it goes on to -- and the sentence
5 continues there.

6 Do you have, in your reliance material, the
7 publicly available documents concerning the FTC's
8 investigation of Barclay that you are prepared to comment
9 on?

10 A. The ones that I presented to y'all --

11 Q. Okay.

12 A. -- are the only ones that I have.

13 Q. All right.

14 A. Now, I'm not sure whether the commission is
15 still working on any further investigation of whether they
16 can find the documents, so I cannot rule out the
17 possibility that they may or may not find the documents.

18 At this point in time, I have turned over
19 everything that I have been able to see. I had -- I had
20 no private files that I took with the commission when I
21 left. So all of the documents are those that were
22 provided pursuant to the FOIA request.

23 MR. HOFFMANN: I would like just to

24 state for the record that we would request that
25 counsel inform us if this witness receives
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2 additional documents from the FTC concerning
3 either the Barclay or Carlton litigation and
4 reviews them in connection with formulating her
5 opinion in this case so we can file a proper
motion to reopen discovery in that regard.

6 MR. PATRICK: We will be more than happy to
7 let you know if we receive anything more from the
8 FTC.

9 Let me go ahead and say, for the record,
10 that, and I don't think that this has been
11 mentioned before, we did an FOIA request to the
12 FTC additionally, beyond that of the Barclay
13 matter, for all documents related to the Carlton
14 issue, the 10-to-1 Carlton ad, and we received
15 documents late Monday afternoon from the FTC.

16 The documents we received were documents, not
17 internal documents of the FTC, but documents that
18 were presented to the FTC by American Tobacco or
19 American Brands.

20 We found the documents to be of limited
21 usefulness, if of any usefulness at all.
22 Ms. Wilkenfeld has briefly, just for a few minutes
23 this morning, looked at those, and I believe it is
24 of her opinion that they are of limited
25 usefulness, if any usefulness.

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1 And she has not reviewed these materials in
2 any detail, that we would probably not, at this
3 point, include those in any reliance materials
4 that she would have.

5 Do you have those?

6 THE DEPONENT: Yes.

7 MR. PATRICK: We'll be more than happy to
8 show them to you, but I don't think that she's
9 based any of her opinions that she's going to give
10 here today on any of that material.

11 MR. HOFFMANN: All right. Let's get those
12 during the lunch break.

13 MR. PATRICK: Okay.

14 BY MR. HOFFMANN:

15 Q. Okay. Well, turning to the Carlton litigation,
16 then. As I understand it, the FTC filed a complaint
17 against Carlton with regard to what's known as the 10-to-1
18 advertising campaign, correct?

19 A. Yes, it would not be correct to call it -- the
20 litigation resulted in a consent decree.

21 Q. I think I said filed a complaint.

22 A. Right, but you used the word "litigation."

23 Q. Oh, I'm sorry; I didn't intend to. But -- so
24 just to make clear, the FTC filed a complaint against
25 Carlton with regard to the 10-to-1 advertising campaign?

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1 A. Correct.

2 Q. And did the FTC file any complaints against
3 Carlton with regard to any other advertising campaigns?

4 A. No.

5 Q. Okay.

6 A. Well, not at that time. If you mean ever, or
7 just at that time?

8 Q. Well, let's talk about ever.

9 A. Prior to my taking over the program, there
10 were -- there were, in the file, certainly consent -- I
11 don't know if they were consents or litigated.

12 There was -- American Brands was under a
13 different requirement as far as the tar and nicotine
14 testing, and then the other companies, because of
15 advertising, what they had done in the '60s or '70s. So
16 there was an American Brands Order from that period of
17 time.

18 Q. Do you know what product that concerned?

19 A. No. I could guess, and I hate to do that.

20 Q. Well, do you know if it -- if the product was
21 Carlton?

22 A. It was not Carlton, as far as I can remember.

23 Q. Okay. So then, going back to my question, did
24 the FTC ever file a complaint against the American Tobacco
25 Company with regard to any other Carlton advertisements,

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other than 10-to-1?

1 A. Any others? Not to my knowledge.

2 Q. Okay.

3 (DFT. EXH. 118, 9/2/80 FTC Letter to
4 American Brands, was marked for
5 identification.)

6 BY MR. HOFFMANN:

7 Q. Let me show you what's been marked as Exhibit 18
8 (sic), and this is a group exhibit. The group exhibit is
9 a series of correspondence. The first letter appears to
10 be a letter from the Federal Trade Commission regional
11 office to the president of American Brands, and it
12 encloses some letters that raise some questions about
13 Carlton advertising. I'm going to ask you about that in a
14 minute.

15 But it says here, "We carefully note and monitor
16 all reports of practices which may be unlawful under the
17 statutes we enforce"; that's true, isn't it?

18 A. I'm sorry; which letter is this?

19 Q. The very first letter, the -- the -- in the
20 first paragraph, Terrence C. Brown, attorney for the
21 Federal Trade Commission says, "We carefully note and
22 monitor and reports of practices which may be unlawful
23 under the statutes we enforce."

24 A. And what about that statement?

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1 Q. Yeah, is that correct; is that what the FTC
2 does?

3 A. I would say that's a bit of hyperbole.

4 Q. Okay.

5 A. We do not have the -- we don't have the staff.
6 We don't have the staff to be able to monitor all reports,
7 practices or ads; in Seattle especially.

8 Q. All right. Now, then the next letter appears to
9 be a letter from someone who is complaining to the FTC
10 about a cigarette advertising practice, correct?

11 A. Uh-huh.

12 Q. And is that -- is that something that happens
13 from time to time, consumers or individuals, public --
14 private citizens will write to the FTC and complain about

15 something that they think is a deceptive or unfair
16 advertising practice?

17 A. As I think I testified earlier, probably tobacco
18 is the one about which we received the most complaints.

19 Q. Okay. Then the next document in this collection
20 is a letter from another consumer enclosing advertisements
21 which that consumer, at least, is raising some questions
22 about, correct?

23 A. Correct.

24 Q. And one of the advertisements enclosed on the
25 next page says "Carlton is lowest; Carlton box, lowest of
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1 all brands, less than 0.01 milligrams of tar, less than
2 0.002 milligrams of nicotine," and then it says, "Carlton
3 box 100s, lowest of all 100s, 1 milligram tar, .01
4 milligram nicotine," correct?

5 A. Correct.

6 Q. Then if you will skip over, there is a letter
7 from Mr. Bahrenburg, it looks like, the project manager of
8 American Tobacco Company responding to the question about
9 the advertising claim that Carlton is lowest, correct?

10 A. Yes.

11 Q. And then, finally, there are letters from
12 attorney Terrence Brown at the FTC back to the two
13 citizens who complained, enclosing copies of the
14 responses, the response of American Tobacco Company to
15 their inquiry, and both of those letters say, "In light of
16 this response, further investigation by the Federal Trade
17 Commission does not appear to be warranted at this time,"
18 correct?

19 A. That's what he said, but he was wrong.

20 Q. Well, why was he wrong?

21 A. Actually, that was the investigation I was
22 talking to you about before, that I said we did continue.
23 And one of the changes that occurred in the '80s, was that
24 regional offices were discouraged from taking tobacco
25 matters, because they didn't have the information

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1 necessary to be able to conduct a proper investigation.

2 Q. All right. Then, subsequent to this
3 correspondence, was there a further investigation of the
4 Carlton ad that's appended to these documents?

5 A. There was a series of ads that was brought to
6 our attention by Brown & Williamson in 1983 -- no, I
7 guess -- '82, '83, which included examples similar to the
8 Carlton and the Cambridge and there was a Now ad that all
9 talked about being the lowest, having these numbers that
10 were lower than the FTC numbers could possibly have been,
11 all claiming to be the lowest. That resulted in my
12 recommendation that had to do with both the testing
13 methodology and the question of the availability of the
14 product.

15 Q. All right.

16 A. The commission, at that time, also believed that
17 a lowest claim did not mean that there couldn't be anybody
18 else as low.

19 Q. Now, did you recommend to the commission at that
20 time that they file a complaint against the American
21 Tobacco Company similar to the one that was filed in the
22 10-to-1 case?

23 A. No.

24 Q. Why not?
25 A. For the two reasons I said earlier. The issue
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1 of the testing methodology. Let's see, is Carlton one of
2 those? Usually lower -- okay, Carlton may not have been
3 one of the ones that had the lower.
4 As far as the availability problem, I felt that
5 because the product was available, even though it wasn't
6 available in large quantities, that the claim was
7 literally true.
8 Q. All right. Well, let's go back to the
9 variabilities.
10 A. No, I didn't file a claim.
11 Q. Okay. Right now, you did not recommend that a
12 claim be filed with regard to the "Carlton is lowest" ads,
13 correct?
14 A. I did, that's true.
15 Q. And you did not recommend that a claim be filed
16 with regard to the less .01 milligram and less than .002
17 milligram -- I'm sorry; less than .01 milligram tar, less
18 than .002 milligram nicotine claim, you didn't recommend
19 that a complaint be filed --
20 A. Correct.
21 Q. -- with regard to that either?
22 A. Correct.
23 Q. But you were aware that during this time that
24 Carlton was, in fact, making a representation that it was
25 the lowest?
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1 A. Correct.
2 Q. And you were aware at this time --
3 A. Not at this time, but in '83.
4 Q. In '83. And in '83, you were aware that Carlton
5 was making claims that the Carlton box had less than .01
6 milligram tar and less than .002 nicotine?
7 A. I was aware of these type of ads. Whether I was
8 aware of this specific one, I can't...
9 Q. Okay. Were you in any way inhibited and
10 constrained in the investigation you undertook that led to
11 your decision to recommend against filing a complaint?
12 A. Constrained by what? I was constrained by
13 resources.
14 Q. By any policies at the commission?
15 A. No, other than the fact that we had limited
16 resources.
17 Q. Okay.
18 (DFT. EXH. 119, 9/9/82 FTC Letter to
19 American Brands, was marked for
20 identification.)
21 BY MR. HOFFMANN:
22 Q. These -- the series of documents that I just
23 showed you, Exhibit 118, that was from the Seattle
24 regional office, would copies of those be sent to the
25 Federal Trade Commission in Washington, or would they
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1 never get past Seattle?
2 A. They would be somewhere in Washington. I can
3 only say that the government's filing system was not
4 perfect.
5 Q. As an expert witness on --

6 A. I can do that as an expert witness because
7 whenever -- okay, the standard operating procedure for the
8 initiation of an investigation was to query the files room
9 for any past actions that might have occurred with that
10 company, and then to have the files delivered to the
11 attorney's office.

12 Q. When you were -- when you were embarking upon
13 the 10-to-1 litigation, would this correspondence from the
14 Federal Trade Commission, Seattle office, be the kinds of
15 things that would have been made available to you?

16 A. I'm trying to remember whether I saw -- that I
17 knew that it was going to happen or not. They certainly
18 should have been made available.

19 Q. Let me hand you what's been marked as Exhibit
20 119. Now, this appears to be a letter from the Federal
21 Trade Commission, Bureau of Consumer Protection in
22 Washington D.C., correct?

23 A. Correct.

24 Q. And, unfortunately, in the copy that was
25 provided to me, the advertisement isn't attached, but this

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1 letter is a letter from the -- from Andrew Sacks, attorney
2 of the Bureau of Consumer Protection; do you know Andrew
3 Sacks, by the way?

4 A. Yes, he was my predecessor, as far as tobacco
5 programs went.

6 Q. Okay. And it's a letter to a senior vice
7 president general counsel of American Brands, and it
8 attaches an advertisement indicating that the Carlton box
9 is the lowest of all brands with less than .01 milligram
10 of tar and less than .002 milligram of nicotine.

11 A. Uh-huh.

12 Q. And it appears that this letter raises the
13 question of whether these tar scores are legitimate, given
14 the fact that the FTC report on tar and nicotine doesn't
15 differentiate between tar scores below .15 milligram and
16 of nicotine below .05, correct?

17 A. Correct. This was the investigation that I was
18 referring to. Andy Sacks handed the investigation off to
19 me as part of my first responsibility.

20 Q. Okay. And then the second complaint this letter
21 has is -- concerns the availability of the Carlton box,
22 correct?

23 A. Correct.

24 (DFT. EXH. 120, 1982 American Brands
25 Letter to FTC, was marked for
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BY MR. HOFFMANN:

3 Q. Let me show you what's been marked as Exhibit
4 120. And this appears to be a letter from Arnold Henson
5 at American Brands to the associate director of
6 advertising practices at the Federal Trade Commission, a
7 Mr. Wallace Snyder; do you know Mr. Wallace Snyder?

8 A. Yes.

9 Q. Okay. And this occurs (sic) a meeting
10 concerning the Carlton advertising that's raised in
11 Exhibit 119; is that correct?

12 A. I'm sorry; this what?

13 Q. Yes. This letter refers to a meeting that
14 concerns the questions raised in Exhibit 119, correct?

15 A. Correct.
16 Q. And although I haven't been able to obtain a
17 copy, there is a Nationwide Consumer Testing Institute
18 report that was provided to the FTC. Do you recall that
19 report being provided to the FTC?
20 A. Again, in 1982, Andrew Sacks was still the
21 program advisor.
22 Q. Okay.
23 A. Whether I saw it -- I must have seen those
24 results at some point.
25 Q. Okay. Now, after receiving this material, the
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1 FTC decided not to bring a complaint against
2 Brown & Williamson in connection with the two questions
3 raised in Exhibit 19 (sic); isn't that correct?
4 A. American Brands.
5 Q. I'm sorry; American Brands, yes.
6 A. Yes.
7 Q. Now, were you involved in that recommendation,
8 the recommendation --
9 A. Well, I don't know --
10 Q. -- not to bring that complaint?
11 A. I don't know whether there were two
12 recommendations or not. Certainly, this -- no this matter
13 was still ongoing, I think. I certainly made a
14 recommendation to the commission about this matter, and
15 that --
16 Q. And that recommendation was what?
17 A. That they not pursue it.
18 Q. And I think we had gone into this a little bit
19 before, and I said I was going to get to that, so I'm
20 going to ask you --
21 A. Now we're here.
22 Q. -- why?
23 A. Why? Okay. It was a more -- it was a broader
24 investigation, it included Cambridge, Carlton and Now, of
25 which -- and as I said before, the reason I can talk about
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1 this, even though it's a closed investigation, which I
2 normally could not talk about, is because Representative
3 Luken received my recommendation years later and put it on
4 the public record. So the information is public.
5 To the best of my recollection, my
6 recommendation said that as far as the testing methodology
7 is concerned -- well, actually, I can't recall all of the
8 things I said, and I would be more comfortable if I could
9 see it.
10 I think as far as availability is concerned, the
11 question of availability was that the product was made
12 available by the companies, it was just not purchased by
13 consumers. That's not your classic bait-and-switch.
14 Normally, bait-and-switches, you don't make it available
15 and consumers want it.
16 In this case, a product was made available.
17 Whether it was for marketing purposes or not, I believed
18 at that time, from the commission's perspective with its
19 limited resources, was irrelevant. The product was
20 available, it wasn't purchased. This was not going to be
21 a worthwhile use of our resources.
22 As far as the testing goes, I don't know how
23 forthcoming I was in the memo that went as far as the

24 commission, but the underlying predicate of my
25 recommendation was that in this case, I guess Carlton had
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1 an outside lab, Philip Morris had its own internal
2 procedures that were testing the products, and it may have
3 been better than our test. I certainly didn't think it
4 was worthwhile getting into litigation about whose testing
5 was better.

6 Q. Okay. And then you say -- was it Senator Luken?
7 A. Congressman --
8 Q. Congressman Luken.
9 A. -- from Ohio.

10 Q. Were hearings conducted with regard to these two
11 decisions by the FTC not to pursue these cases?

12 A. No. I'm not sure which hearings this document
13 came to light during. It might have been -- it probably
14 was during the Oliver administration. It may have had to
15 do with our closing of the lab. I can't remember which of
16 the hearings. I just remember coming out and having him
17 read it to the whole assembled audience. Bureaucrats hate
18 that.

19 Q. Okay. Was there any dissent among the staff of
20 the commission to your recommendation not to bring a
21 complaint with regard to the ad on the testing numbers?

22 A. I would say that we all had very mixed feelings,
23 and that we had the spirit of discussions that led to the
24 recommendation. We all concurred in the recommendation in
25 the end, if for no other reason than resources and

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1 difficulty of proof.

2 Q. And same question with regard to the
3 availability of the Carlton box, was there any dissent in
4 the commission?

5 A. On the availability? Again, same squeamishness,
6 but both the issue of proof and the availability of
7 resources would have --

8 COURT REPORTER: Would have what; I'm
9 sorry?

10 THE DEPONENT: Difficulty of proof and
11 availability of resources or availability of
12 proof -- no; difficulty of proof and availability
13 of resources.

14 BY MR. HOFFMANN:

15 Q. Now, when you make a recommendation not to bring
16 a complaint, who do you make it to or who did you make it
17 to, not the name, but the title?

18 A. The recommendation -- let me see, in 1983, I'm
19 trying to remember. In 1983, it might have gone first to
20 the assistant director, then to the associate director,
21 then to the bureau director, then to the commission.

22 Q. So that would be the Bureau of Consumer
23 Protection --

24 A. Correct.

25 Q. -- when you say "the bureau"?

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1 A. Yeah.
2 Q. Now, if it goes to the -- you said first the
3 assistant, then the associate, and then the director, and
4 then the commission.
5 A. Yeah. I'm not positive whether it went to the

6 assistant director, but that would have been the chain.
7

8 Q. Okay. If your recommendation -- and are we
9 talking about two separate recommendations here, one on
the testing method that was --

10 A. No, one.

11 Q. Okay. One, okay.

12 A. Oh, I'm sorry. This never would have gotten
13 past the bureau director. I'm sorry. When you asked
14 about recommendations, I gave you the chain of command all
15 the way up if it were going to be a complaint or some
16 formal action.

17 If it were not to bring an action, unless the
18 commission had requested information about this particular
19 matter, it would not go beyond the associate director, if
20 it were of a certain level of importance, or the bureau
21 director, if it were a matter of greater importance.

22 Q. Do you know how far this one went?

23 A. This one, if it didn't go to the commission, it
24 certainly would have been discussed with the general
25 counsel. Because in addition to this investigation,

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1 Brown & Williamson brought the same matters to our
2 attention, and because it got involved in the Barclay
3 litigation, it would have been discussed, at least as high
4 as the general counsel's office, and may have been
5 discussed with commissioners; I can't be sure.

6 Q. Now, you've confused me because you --

7 A. I'm sorry.

8 Q. -- didn't put the general counsel's office in
9 your chain, you went assistant associate director and
10 commission --

11 A. Well, okay, normally you don't go to general
12 counsel, but if you're going into litigation in the
13 District Court, the general counsel is the party of
14 record.

15 Q. And this is general counsel to the commission?

16 A. Yes.

17 Q. Now, going back to my question, you believe that
18 your recommendation not to file a complaint in connection
19 with these other Carlton ads that we have just been
20 talking about was discussed with the general counsel.

21 A. At one time or another, I believe it must have
22 been.

23 Q. Okay. Well, who was the final decision maker
24 who accepted your recommendation; at what level did that
25 occur? Would that be the director of the bureau?

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1 A. Well, the recommendation was not to pursue the
2 investigation.

3 Q. Yes.

4 A. So the ultimate decider in normal conditions
5 would be the associate director.

6 Q. Okay.

7 A. In this case, the bureau director may have
8 waited on the issue because of the ongoing litigation.

9 Q. So the associate director then would have
10 accepted your recommendation, correct?

11 A. Correct.

12 Q. And if the bureau director weighed in -- the
13 bureau director, weighing in at that point, had the power
14 to reverse that and reject your recommendation of bringing

15 a complaint?

16 A. Right. Well, recommend being a complaint.

17 Q. Recommend. So he would have made -- the
18 bureau -- he or she would have made a recommendation to
19 the commission then.

20 A. No, they would have directed me to go back and
21 rewrite my memo.

22 Q. Okay. But that obviously didn't happen?

23 A. No.

24 Q. Okay. So would it be fair to say that to the
25 extent that your recommendation was reported up the chain

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1 of the command, the chain of command at the FTC, there was
2 unanimity in the decision to accept your recommendation?

3 A. Correct, as far as I know.

4 Q. Now, the Carlton -- well, let me back up for a
5 minute.

6 I'm reading from the pre-complaint memorandum of
7 the American Tobacco Company filed in the Carlton 10-to-1
8 litigation, and it says, "Based on discussions with the
9 staff, American Tobacco understands that the staff has no
10 issue with any of its Carlton advertisements except the
11 10-to-1." That was correct, wasn't it?

12 A. I don't -- I haven't seen that document, so I
13 don't know if they said before or after it.

14 (Tendered document.)

15 BY MR. HOFFMANN:

16 Q. You must have seen that document at some point.

17 A. I'm sure I did at some point; I haven't seen it
18 recently.

19 Q. But in connection with your opinions in this
20 case concerning the Carlton litigation, you have not gone
21 back and reviewed American Tobacco Company's pre-complaint
22 submission, correct?

23 A. That would not have been provided to me by the
24 Federal Trade Commission pursuant to their FOIA request.

25 Q. Okay.

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1 A. So I would not have seen it since then.

2 Q. Would that be something for you -- useful for
3 you to review in connection with offering opinions about
4 the Carlton litigation?

5 A. More information is always better than less
6 information. I'm just trying to find the date on this.
7 Do you know what the date on this was?

8 Q. I don't, unless it shows; I don't know if
9 there's a certificate of service.

10 A. The only ads that we were challenging at that
11 time were the 10-to-1 ads, so we would have made the
12 recommendation to them that at that time that was all we
13 were considering. So if that's what you're asking --

14 Q. Page 20. I'm just asking you whether that
15 sentence I read from page 20 is correct.

16 A. Okay. I would not have been the only attorney
17 on this matter, that's why I'm looking for the date,
18 because I was involved in another matter at that time, so
19 that I would have been relying also on staff people under
20 my supervision.

21 That's an accurate statement.

22 Q. That is an accurate statement?

23 A. Yes.

24 MR. HOFFMANN: I tell you what, I don't
25 have a copy of this, but let's go ahead and mark
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1 as an exhibit the cover sheet and the page where
2 that excerpt occurs and get a copy later.
3 MR. PATRICK: That's fine.
4 (DFT. EXH. 121, Carlton pre-Complaint
5 Memo, was marked for identification.)
6 MR. HOFFMANN: That will be Defendant's
7 Exhibit 121.
8 BY MR. HOFFMANN:
9 Q. Now the Carlton litigation was resolved by a
10 consent order, correct; the 10-to-1 litigation was
11 resolved by a consent order?
12 A. It's not a litigation.
13 Q. The 10-to-1 proceedings.
14 A. Thank you.
15 Q. Administrative proceedings, is that how you --
16 A. You know, when they don't even get to the point
17 of an administrative law judge, we usually refer to them
18 as negotiations. They have -- because they resulted in an
19 order that is binding against the company but whose legal
20 effect is not binding on -- is not on other companies.
21 Q. Okay.
22 A. So it's --
23 Q. So we can refer to this --
24 A. An administrative proceeding.
25 Q. All right. Administrative proceeding. But you
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1 also refer to it as a negotiation. The negotiations
2 concerning the Carlton 10-to-1 ad resulted in a consent
3 order?
4 A. Right.
5 Q. It did not result in an adjudication; did it?
6 A. Correct.
7 Q. So there was never any adjudication that the
8 10-to-1 ads were false or deceptive or unfair; isn't that
9 true?
10 A. The legal effect is that there is not an
11 adjudication.
12 Q. Okay.
13 A. There is a finding by the commission and a
14 non-admission by the company.
15 (DFT. EXH. 122, Carlton Consent Order,
16 was marked for identification.)
17 BY MR. HOFFMANN:
18 Q. All right. And let me show you what's been
19 marked as Exhibit 122, and I'll ask you if that is a copy
20 of the agreement containing Consent Order to Cease and
21 Assist in connection -- that resulted from the
22 negotiations regarding the 10-to-1 advertisements?
23 A. It appears to be.
24 Q. And on Paragraph 5 on page 2, it says, "This
25 agreement is for settlement purposes only and does not
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1 constitute an admission by proposed respondent that the
2 law has been violated as alleged in the draft of the
3 complaint here attached, or that the facts as alleged in
4 the draft complaint, other than jurisdictional facts, are
5 true"; that's correct, isn't it?

6 A. That's a very standard paragraph.
7 Q. Right. And if you'll turn over to page 5, is
8 that your signature on page 5 as counsel for the Federal
9 Trade Commission?
10 A. It is indeed.
11 Q. And I take it that is not your intention in your
12 testimony in this case to repudiate anything in this
13 consent agreement, is it?

14 A. Repudiate?
15 Q. To state that you disagree with.
16 A. I don't disagree with the consent.
17 COURT REPORTER: I'm sorry?
18 THE DEPONENT: I don't disagree with the
19 consent.
20 If I'm not mistaken, it was finalized after I
21 left the commission.

22 BY MR. HOFFMANN:

23 Q. Okay. Now, do you recall the law firm of
24 Chadbourne and Parke being the counsel for the American
25 Tobacco Company in that case in that case?

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1 A. I think so, yes.
2 Q. And Dan O'Neill and Tom Bezanson, in particular?
3 A. I remember Dan O'Neill, specifically. We didn't
4 meet very often.
5 Q. All right. Did the lawyers for
6 Brown & Williamson -- I'm sorry, for the American Tobacco
7 Company, do you believe they negotiated with the
8 commission in good faith with regard to this issue?

9 A. Yes.
10 Q. And I take it you don't intend to offer the
11 opinion that the lawyers for the American Tobacco Company
12 did anything improper in connection with their
13 negotiations relating to the 10-to-1 ads; is that fair?

14 A. That's fair.
15 (DFT. EXH. 123, FTC Press
16 Release/Carlton, 1994, was marked for
17 identification.)

18 BY MR. HOFFMANN:

19 Q. Let me show you what's been marked as Exhibit
20 123, and ask you if you can identify that?

21 A. By this time I was not at the Federal Trade
22 Commission, but this appears to be a press release
23 announcing proposed settlement.

24 Q. Okay. And on page 2, this states, "A consent
25 agreement is for settlement purposes only and does not

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1 constitute an admission of a violation of law," correct?

2 A. Correct.
3 Q. To your knowledge, has the American Tobacco
4 Company ever violated this consent agreement?

5 A. My understanding is, shortly thereafter, I'm not
6 sure what period of time it is, but that American Brands
7 was acquired by Brown & Williamson, so I'm not sure there
8 was a long period of time left, but I have no knowledge
9 that they violated this agreement.

10 Q. And that was my next question. Do you have any
11 knowledge that Brown & Williamson ever violated this
12 agreement?

13 A. I have no knowledge one way or the other.
14 Q. And this agreement would be binding on

15 Brown & Williamson as the successor to the American
16 Tobacco Company; wouldn't it?

17 A. Yes.

18 Q. And Brown & Williamson's never taken the
19 position, to your knowledge, that it's not binding on it,
20 has it?

21 A. If they took that position with the commission,
22 I wouldn't have known it.

23 COURT REPORTER: You would not have?

24 THE DEPONENT: I would not know that.

25 BY MR. HOFFMANN:

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1 Q. I want to go back to Exhibit 121, and page 20
2 that we've excerpted from it, and I can let you look at
3 this if you need to.

4 A. Oh, okay.

5 Q. But let me go ahead and read it. It says, "The
6 staff has advised American Tobacco their issue of 10-to-1
7 is that they -- is that they have commissioned a consumer
8 study which suggests the Carlton ad is misleading because,
9 unlike all the others, it leads consumers to believe that
10 the ad is not simply comparing published tar and nicotine
11 data, but somehow addressing what they, the consumers,
12 will get. The staff says that the ad implies a consumer
13 will get less tar by smoking ten packs of Carlton than by
14 smoking a single pack of the other brands of cigarettes
15 depicted in the ads."

16 And then there's a footnote that says that "It's
17 difficult for the American Tobacco Company to respond to a
18 study that it's never seen."

19 Now, my question is, did, in fact, the
20 commission, commission a consumer study that suggested
21 that the Carlton ad was misleading?

22 A. Yes.

23 Q. And was that study ever provided to the American
24 Tobacco Company or its attorneys?

25 A. It would not have been. It would have been
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1 standard procedure for the commission not to disclose its
2 evidence in case the case went to litigation.

3 Q. And have you attempted to obtain that study in
4 connection with FOIA request?

5 A. Okay. To make it clear, it's their FOIA
6 request, not mine, but with that caveat, yes.

7 Q. Is that study within the scope of the FOIA
8 request that you --

9 A. Yes.

10 Q. All right. And have you been able to -- you or
11 the Ness, Motley firm been able to obtain that study?

12 A. No.

13 Q. And since you left the commission, have you seen
14 that study?

15 A. No.

16 Q. While you were at the commission did you see
17 that study?

18 A. Yes.

19 Q. Tell me what you recall about the study and what
20 it said?

21 A. As I remember, there was a significant -- what
22 the commission would consider a significant number of
23 consumers who interpreted the study, that the ad indicated

24 that they would get less tar.

25 Q. Would this study be something useful for you to
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see in rendering opinions about the Carlton case?

1 A. I'd love to see it.

2 Q. In fact, in your view, this would be very useful
3 to you in rendering these opinions?

4 A. Well, in my opinion, as to why the commission
5 made the decision it made, the fact that in those days the
6 commission would have never accepted a consent judgment
7 that it did not feel -- had indicated that -- by -- they
8 required, at that time, a sufficient record of evidence on
9 which to have based a litigation.

10 So as far as that's concerned, I don't need to
11 see the copy test. I know what it said. I know what the
12 commission's response to it was.

13 Q. What was the --

14 A. Well, they accepted the complaint.

15 Q. Okay.

16 A. They issued the complaint and accepted the
17 consent, something they would not have done without
18 adequate evidence.

19 Would it be useful? It's always useful to have
20 more information than less.

21 Q. Who performed this study?

22 A. I wish I could remember. We had a lot of firms
23 at the time. It probably was overseen by somebody
24 in-house. As I said, by that time we were having

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somebody -- a professor on staff.

1 Q. Do you remember who that was?

2 A. No; no, I don't. This matter was in the
3 mid-1994 period. Shira Modell, who was the attorney of
4 record, I was the supervisor, she would have had more of
5 the day-to-day; I would have seen the results.

6 At this particular time, I was trying to
7 convince the commission to issue a complaint against
8 Reynolds advertising of Joe Camel, which is where I spent
9 a lot of my time.

10 Q. What was the first name; you said something
11 Modell?

12 A. Shira, S-h-i-r-a, Modell, M-o-d-e-l-l; it's the
13 other name on page 5.

14 Q. Oh, okay. Got you. Is Shira Modell still with
15 the commission?

16 A. She is. And I could ask her for the test, and
17 she wouldn't give it to me, because it would be wrong.

18 Q. Can you think of any other material in the
19 Carlton 10-to-1 file that you haven't been able to obtain
20 that would be useful to you in forming your opinions for your
21 testimony in this case?

22 A. You know, I have sufficient evidence to form my
23 opinion. Again, on the theory that it's always better to
24 have more information than less, I wouldn't mind seeing

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the memorandum that we sent forward, I wouldn't mind
27 seeing the memo that American Brand said it -- I mean,
28 it's always good to review a case file. It's a limitation
29 that government lawyers have, their inability to take
30 files with them.

6 Q. Do you have any -- are you able to judge what
7 percentage of the 10-to-1 case file you've been able to
8 obtain?

9 A. No. In the case of the -- because it went on
10 after I left, and so what you would have -- I know some of
11 the things they produced, for instance, included the
12 compliance files. I don't know how much was in the
13 compliance files.

14 Compliance files would have been after the
15 company signs a consent, it has to send information to the
16 commission indicating that it -- what it is doing to be in
17 compliance.

18 So the extent of the American Brands file is
19 something I didn't know at the time.

20 Q. Well, do you think it's wrong for commission
21 attorneys, when they leave, to take information from the
22 commission files, even though they think they might be
23 able to use that for some good public purpose?

24 A. Is it wrong to take it or not take it?

25 Q. To take it.

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A. It's wrong to take it.

Q. Do you think it is wrong for a paralegal working
for a tobacco company to steal confidential information
from tobacco files, even though he thinks it might be used
for a better purpose?

MR. PATRICK: Objection.

THE DEPONENT: I don't know the ethic rules
involved in that. I live by the ethics rules that
the government had. In addition to the fact that
there are ethical rules, there are also legal
requirements that are past and have legal
consequences. I'm not aware of what those are in
a law firm.

BY MR. HOFFMANN:

Q. If a government employee were to take
confidential information from the files when he or she
leaves, intending to use it for a public health purpose,
do you think it would be wrong for private attorneys to
purchase that information from the government employee?

A. You mean after the person left or while they
were there?

Q. After they left.

A. My personal opinion, as opposed to a rendering
of the ethics laws, is that that would be wrong.

Q. But you don't know --

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A. Oh, it would be wrong for the employee, not
necessarily for the law firm. You know --

COURT REPORTER: I'm sorry; I can't hear
you.

THE DEPONENT: Not necessarily wrong for the
law firm.

BY MR. HOFFMANN:

Q. So what you're telling me is that if a
government employee wrongfully takes documents from the
government agency for whom -- for which he or she works.
And then subsequently a lawyer purchases those, those
documents from that government employee, you're willing to
say that the government employee did something wrong, but
you're not willing to say that the private attorney did

15 something wrong?

16 A. I don't know whether -- I mean, I do know that
17 in the course of our investigation of the Food and Drug
18 Administration, materials would come to us after
19 allegations had been made of how they were acquired, not
20 acquired by us, because we had very high -- high standard
21 of what we would accept. But if a material had been
22 accepted by a third party and made public in some way or
23 another, we would use that. I don't think that what we
24 did was wrong.

25 Q. Okay. Well, do I understand you correctly to
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1 say that you understand the ethic rules that apply to
2 government lawyers, but you're not familiar with the ethic
3 rules that apply to private lawyers and paralegals?

4 A. Well, I mean -- I don't know about any ethics
5 rules about paralegals, first of all. I have a general
6 understanding of the rules that apply to lawyers.

7 I'm much more familiar with the rules of ethics
8 that apply to government lawyers, because when I went to
9 law school they didn't teach ethics, and it wasn't on the
10 bar. So I only know what's made it through, you know, my
11 readings. So I'm not a real expert. I've never practiced
12 in a private law firm, so I have not had to be aware of
13 what those rules are.

14 Q. Are you a practicing lawyer now?

15 A. I guess, you know, I pay my dues.

16 Q. So you are a member of the bar of the District
17 of Columbia, correct?

18 A. Right. My functions that I perform now --
19 actually, when I went out to the Food and Drug
20 Administration, I went with the Office of Policy. In the
21 government, it's very clear what you are by the office
22 you're in.

23 In that particular office, I was not acting in a
24 capacity as a lawyer. So from the time I went to the Food
25 and Drug Administration until now, I have not acted in any

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1 capacity as a lawyer. I still pay my dues, and I'm a
2 lawyer, so...

3 Q. But you don't derive any income today from the
4 practice of law?

5 A. None whatsoever.

6 MR. HOFFMANN: Let's go off the record
7 for a minute.

8 THE VIDEOGRAPHER: Off the record at
9 approximately 1:23.

10 (A luncheon recess transpired.)

11 THE VIDEOGRAPHER: Back on the record at
12 approximately 1:59.

13 BY MR. HOFFMANN:

14 Q. Let me hand you what's been marked as Exhibit
15 124.

16 (DFT. EXH. 124, Composite Carlton FOIA
17 Docs, was marked for identification.)

18 BY MR. HOFFMANN:

19 Q. As I understand it, those are documents that
20 were provided to you pursuant to a FOIA request that the
21 Ness, Motley firm made of the Federal Trade Commission,
22 correct?

23 A. My understanding is that these were sent to

24 Ness, Motley be the FTC.

25 Q. Okay. And further, that all of those documents
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1 relate to the Barclay -- I mean, the Carlton proceedings
2 that we have been discussing; is that correct?

3 A. Yes.

4 Q. Other than -- and further, as I understand it,
5 you saw those for the first time this morning and have
6 only had an opportunity to conduct a very cursory review
7 of them; is that fair?

8 A. That's correct, yes; I have not been able to
9 read them.

10 Q. Other than those documents, have you reviewed
11 any other publicly available documents relating to the
12 Barclay -- I mean, the Carlton proceedings in connection
13 with forming your opinions for this case?

14 A. You mean other than those --

15 Q. Other than that exhibit right there.

16 A. There were some earlier documents, but I would
17 have provided them to you-all in the materials I had to
18 bring the first day.

19 Q. Okay.

20 A. I don't remember there being --

21 Q. Yeah, what do you recall that you have reviewed,
22 other than the documents in Exhibit 125, relating to the
23 Carlton proceedings?

24 A. I looked at the advertising; I think I looked at
25 both some external advertising and also advertising that

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1 had been collected by the Federal Trade Commission that
2 they provided pursuant to the FOIA request. I know that
3 they provided materials from the compliance division that
4 I've reviewed, and there may have been a few other things.

5 Q. Okay.

6 A. There was not the copy test that had been
7 performed by the Federal Trade Commission.

8 Q. Paragraph 5 of your disclosure in this case says
9 you will be asked to comment on publicly available
10 documents concerning the FTC's investigation of Carlton,
11 including documents pertaining to the 10-to-1 ads and
12 consent agreement.

13 In order for you to -- well, let me first ask
14 you this. With regard to Exhibit -- what is it? 125 that
15 we've just marked --

16 MR. PATRICK: 124.

17 Q. -- 124 that we've just marked, I would like to
18 request that if it is the intent that you'll be asked to
19 comment on any of those documents, or if any of those
20 documents, upon your review, will form a basis for any
21 opinions you intend to offer in this case that we be
22 notified, and I think Mr. Patrick's probably already
23 agreed to do that; is that correct?

24 MR. PATRICK: Yes, we will.

25 BY MR. HOFFMANN:

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1 Q. Now, other than documents, the ones you reviewed
2 earlier, as you sit here today, can you think of any
3 comments, again referring to this disclosure that said
4 that you might be asked to comment, can you think of any
5 comments you have about publicly available documents

6 relating to the Carlton investigation that you intend to
7 provide in your testimony in this case?

8 A. No, other than just a description of how the
9 commission came to challenge this ad, what its processes
10 were, and the problems that the ad -- the types of
11 problems that the ad raised that the commission found
12 worth challenging.

13 Q. Okay. Well, tell me, what were the problems
14 that the ad raised that the commission found worth
15 challenging?

16 A. Well, at the time, and I was surprised -- I was
17 asked earlier whether the commission challenges every ad
18 that's deceptive, and there's this perception that the
19 commission had a team of scientists in white coats
20 monitoring television and radio and newspapers for all of
21 the ads in American. In fact, that's not the case.

22 Ads are brought to our -- to their attention by
23 citizens, by congressmen, by et cetera, and by a very
24 haphazard ad review that's done, haphazardly at best, as
25 resources are available.

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1 In the case of magazine and newspapers, there's
2 a clipping service -- it's not a clipping service, excuse
3 me -- secretaries, that the ad -- the newspapers that they
4 can get, and the magazines, clip the ads and put them in
5 files by category, by company. And I would try, a couple
6 times a year, if I had the time, to go in and look through
7 the cigarette ads just to see what was out there.

8 This would have been in 1994, when we were quite
9 overwhelmed by the Joe Camel investigation, and I decided
10 one day to go and look through the files, say it's time to
11 go look through all the ads, because you don't usually
12 find much in cigarette ads. They're generally sort of the
13 slice of life.

14 When I came upon this ad, the minute I saw it, I
15 said that's incredible, deceptive.

16 Q. The 10-to-1 ad?

17 A. The 10-to-1 ad. It had been -- you know, we had
18 been trying to find a vehicle to discuss tar and nicotine
19 problems, but this one wasn't a vehicle for that.

20 This one was just such a blatant example of the
21 problems that the tar and nicotine methodology produced,
22 which is that the implication that you could smoke ten
23 packs of one type of brand and get less tar than if you
24 smoked one pack of another, not only misused the tar and
25 nicotine numbers, but it also preached over-consumption in

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1 a way that was dangerous.

2 I showed it immediately to Lee Peeler, he
3 agreed, and we showed it to bureau director who also had
4 no problem with it.

5 It was the first time in a long time that I had
6 seen an ad that had such universal reaction at the
7 commission.

8 But after that, we went and did copy tests,
9 negotiated with the company, the commission had no problem
10 with --

11 COURT REPORTER: The commission had no
12 problem?

13 THE DEPONENT: The commission had no problem
14 with this one.

15 BY MR. HOFFMANN:

16 Q. What do you mean "with this one"? You said you
17 went to the copy test --

18 A. Oh, I was just going through the process that we
19 went through. The commission had no problem accepting --

20 Q. Your recommendation?

21 A. Right.

22 Q. Okay. All right. Now, in the -- let me go back
23 to the Barclay case for a minute. In the Barclay case,
24 the commission had a problem with the Barclay ad, a
25 complaint was filed, it was litigated and it was resolved,

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1 ultimately, by the courts, right?

2 A. Somewhat similar to.

3 Q. Okay. Well, it was brought to the commission's
4 attention by another tobacco company?

5 A. Yes, they didn't issue a complaint. They went
6 to the District Court. They authorized general counsel to
7 seek a permanent injunction from the District Court.

8 Q. And in Barclay case, the system worked the way
9 it was supposed to work, right?

10 A. Well, other than the two years we spent being
11 enjoined by Brown & Williamson, yes, it worked the way it
12 was supposed to work.

13 Q. But you're not suggesting that
14 Brown & Williamson did anything wrong by availing
15 themselves to the Federal Court, are you?

16 A. I came in after that time. The commission
17 certainly felt aggrieved that Brown & Williamson found a
18 judge who was about to go off fishing on a summer
19 afternoon, or whatever it was, and got the TRO before
20 anybody could know about it, but it's not unethical,
21 certainly, it was just -- it just was.

22 Q. It just was what?

23 A. It was legal practice.

24 Q. And in the Carlton case, the system worked the
25 way it was supposed to work, right --

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1 A. Yes.

2 Q. -- you brought a complaint?

3 A. Right.

4 Q. In fact, in the Carlton case, the system worked
5 very well and very smoothly, because the Carlton case was
6 negotiated and resolved by agreement in a fairly short
7 period of time, wasn't it?

8 A. And, in fact, in the commission practice, the
9 vast majority of matters are resolved through consensual
10 agreement as opposed through litigation.

11 Q. And I take it you wouldn't say the Carlton
12 matter was any more or any less easily resolved than other
13 commission matters; would that be fair?

14 A. I would put it, on the scale of hard to easy,
15 I'd put it closer to easy.

16 Q. Okay.

17 A. It was -- it was easy.

18 Q. Let me show you what's --

19 (DFT. EXH. 125, Note of FTC/Barclay, was

20 marked for identification.)

21 BY MR. HOFFMANN:

22 Q. -- been marked as Exhibit 125. And this
23 appears to be a memorandum; are you familiar with this

24 document?

25 A. Yeah.

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1 Q. Okay. Well, tell me what it is.

2 A. You know, I'm trying to remember exactly who
3 would -- I guess -- this is a note of the commission, I
4 think, and this would have summarized the commission's
5 proceedings.

6 Q. And this would have summarized the commission's
7 proceedings after the proceedings had been resolved?

8 A. Yes. This -- you know, this records the vote.
9 It's the secretary's notes of what occurred --

10 Q. Okay.

11 A. -- at the commission hearing.

12 Q. All right.

13 A. Well, not necessarily -- well --

14 Q. It appears that there are two lines of this
15 document that have been redacted; do you see that?

16 A. I do.

17 Q. Do you know why those lines were redacted?

18 A. You know, I smile, because I didn't know that
19 they don't like you to know what the Bureau of Economics
20 recommended.

21 Q. So the two lines that are redacted are both --
22 set forth recommendations by the Bureau of Economics --

23 A. Right.

24 Q. -- is that right?

25 A. Right.

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1 Q. Do you know what those recommendations were?

2 A. Do I know what those recommendations were?

3 Without reading them again, I wouldn't want to comment on
4 that.

5 And I tell you, the fact that they've redacted
6 it, says to me that they still think it's non-public. And
7 if it's non-public, then I probably feel constrained.

8 Q. So even if you knew what the redacted sentences
9 said, you would feel obligated not to disclose that; is
10 that correct?

11 A. Probably.

12 Q. Okay.

13 A. But I don't know what those said. This is not
14 something that I would have seen in the normal course of
15 my business at the commission, even though I think --
16 yeah, this was long after I was -- well, not long; it was
17 after --

18 Q. Okay?

19 A. -- I was gone. Well, I was in the process of
20 leaving.

21 Q. And I take it the two memoranda referred to
22 there, August 4th, '94, and September 12th, 1994, have not
23 been produced in response to the FOIA request, correct?

24 A. No.

25 Q. And would it be fair to say that they would have

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1 fallen -- that they would fall within the scope of FOIA
2 request?

3 A. They would have, but they'd fall within one of
4 the exceptions --

5 Q. Right.

6 A. -- pre-decisional.
7 Q. And in formulating your opinions in connection
8 with the Barclay proceedings, would it be useful for you
9 to have those two memoranda?

10 A. No.

11 Q. Why not?

12 A. The Bureau of Economics would have given its
13 opinion. They had interesting opinions. It was of no
14 effect to the commission, nor to our recommendation. So
15 I...

16 Q. Were there demand letters sent to -- were there
17 ever any demand letters sent to the American Tobacco
18 Company with regard to Carlton, other than the 10-to-1 --
19 other than relating to the 10-to-1 advertisements?

20 A. I couldn't say. You know, getting demand or
21 access letters from the commission, even when you're an
22 employee, are pretty difficult. So whether -- as I said,
23 we tried to keep tobacco matters at headquarters, but we
24 weren't always successful. So I couldn't testify one way
25 or the other as to whether others might have been sent.

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1 Q. Okay.

2 A. I don't remember sending any of those.

3 Q. Similarly, can you tell me whether any --

4 A. Wait a minute. Wait a minute. There would have
5 been one probably -- yeah -- oh, did you say on Carlton or
6 on --

7 Q. Yes, I'm just asking about Carlton.

8 A. Well, except for the one that was sent by Andy
9 Sacks.

10 Q. 10-to-1?

11 A. Oh, 10-to-1 only?

12 Q. No, no, no. Let me go back. The record's all
13 confused here.

14 A. Okay.

15 Q. Other than 10-to-1, are you aware of any demand
16 letters that were sent to the American Tobacco Company
17 concerning Carlton?

18 A. Yes, you showed me one.

19 Q. Okay. Any others?

20 A. I don't know whether in my investigation of
21 American Brands, I sent out an additional letter, in
22 addition to Mr. Sacks' letter, so I may or may not have.
23 I did meet with American Brands, so there would have been
24 some correspondence, whether it was in the form of a
25 demand or access letter, I don't know.

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1 Other than those -- oh, Carlton. Well, I'm
2 trying to remember. There were -- there were -- I think I
3 will go with I don't know.

4 Q. Okay. Are you aware of any demand letters that
5 were sent to the American Tobacco Company about products
6 other than Carlton?

7 A. Well, there were -- we had, at any given time,
8 we also had -- I don't know if they were part of that, we
9 had an Omnibus resolution on Tobacco advertising directed
10 to kids. I'm not sure whether we would or would not have
11 sent a letter to American Brands at that time.

12 We had -- I couldn't say specifically; I would
13 be surprised if there were not letters sent.

14 Q. Okay. But you don't recall any specific

15 letters?

16 A. Specific letters, I would have trouble
17 recalling. I have to refresh my recollection.

18 Q. What is a demand letter?

19 A. Well, it was a demand letter up until Jim Miller
20 became chairman, it became an access letter at that point,
21 which is more polite.

22 A demand letter is a statement by staff. Staff
23 at the FTC has more power than do most bureaucrats. They
24 can look at an ad and say, Gee, I have problems with this.
25 Draft a letter that says to the company we believe your ad

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1 says X, Y and Z, please provide us with the substantiation
2 for that claim, and any and other and all information that
3 you might want to provide. Those are done routinely. And
4 rather routinely, companies comply. Most of them do not
5 lead to complaints. They are called -- they went from
6 demand to access, because they became more polite during
7 that period.

8 When the commission, in its FOIA's responses,
9 says that it's not giving up something that it would have
10 gotten in lieu of compulsory process, they're referring to
11 materials generally received in response to the demand
12 letter, because they are not compulsory process.

13 Q. Are you aware of any demand letters that have
14 been sent to Brown & Williamson, other than demand letters
15 regarding Barclay advertisements?

16 A. Well, I know I wanted to send them one about --
17 not just Kool Ultra, but about Kool advertising that was
18 directed to kids. Whether I sent it or not, I don't know.
19 As I said, these things -- we sent out lots of them.

20 I would be surprised if there were not other
21 demand letters that would have been sent to
22 Brown & Williamson -- wait a minute. Yes, oh, there was
23 that one. Shoot what was that? Snow White, Snow White, a
24 trailer for a -- one of Brown and -- I think it was one of
25 Brown & Williamson's brands, ran an ad in a movie theater

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1 in Newtonville, Massachusetts, and it was during a kiddy
2 program, it was either Snow White or something like that,
3 in the hometown of Peggy Charen (ph), the president of
4 Action for Children's Television. I think they got a
5 letter from me on that.

6 Q. And they were just as appalled that that
7 happened as you were, weren't they?

8 A. I just know they were. I said to the
9 commission, boy, could this -- yeah.

10 So there were, over times, probably letters like
11 that in which something happened. When things like that
12 happened, which we also recognized were probably the
13 result of inadvertence as opposed to a calculated plan, we
14 worked it out voluntarily in the industry.

15 And in that case, Brown & Williamson, I think,
16 said they were never going to show an ad in a movie
17 theater again.

18 Q. And that -- and it's your understanding that
19 that ad, appearing in connection as a trailer with that
20 movie, was, in fact, inadvertent, wasn't it?

21 A. That -- you know, I don't know whether it was or
22 was not. I was certainly willing to treat it that way.
23 You would not have chosen Peggy Charen's hometown to do

24 that otherwise. It made us find out that companies were
25 human.

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1 So there might have been, over the years, many,
2 many letters like that. As far as ad campaigns, as I
3 said, I think I had some problems with some Kool ads at
4 one time or another.

5 Q. But you don't think you sent a demand letter?

6 A. I don't remember; I mean, I know the ad
7 campaign.

8 Q. What ad campaign was it?

9 A. It was a very in-your-face adolescent ad
10 campaign. It had both a black version and white version,
11 two kids leaning against a motorcycle. And it was for
12 Kool.

13 In my part of town, which is more African
14 American, all the way down Georgia Avenue, one bus stop
15 after another had one of these. I was convinced this was
16 an attempt to increase Brown & Williamson's market share
17 among adolescents. If so, it was also roundly
18 unsuccessful. I don't think Brown & Williamson has a
19 significant underage market.

20 So as I say, over the years, there would have
21 been letters that I might have sent. They might have been
22 a part of the Omnibus petition, but I doubt through the
23 commission which was compulsory process on the issue youth
24 advertising.

25 We might have sent out some letters on a low-tar
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petition we got. It's always a lot of letters.

Q. And since you mention an ad with black and
white, I think you said kids, but you don't think that the
models used in the advertisements were under 25-years old;
do you?

A. Well, it certainly would violate the industry's
code, wouldn't it?

Q. Right.

A. They looked adolescent.

Q. Okay.

A. I would never bring -- I would never have
recommended bringing a case against a company because they
used models who looked under the age of 26.

Q. But you did mention black and white
advertisements. Did the commission ever have a problem
because any tobacco companies used African-American models
in their advertisements?

A. Used or didn't use?

Q. Used.

A. It wouldn't have been either way.

Q. Okay.

A. That would not be actionable under the Federal
Trade Commission Act.

Q. Okay. Nor would it be actionable to use an
advertisement that used a particular ethnic lingo, or

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1 something like that, to try to appeal to a particular
2 ethnic group, would it?

3 A. The commission would have looked at various ads
4 and products designed for specific groups and targeted to
5 specific groups, but would have been hard-pressed to come

6 up with a legal theory.

7 Q. Are you familiar with the concept of market
8 segmentation --

9 A. Yes.

10 Q. -- in advertising?

11 And are you familiar that one way markets are
12 segmented is by ethnic groups?

13 A. Uh-huh, yes.

14 Q. In and of itself, does the commission have any
15 problem with tobacco companies using market segmentation
16 in their advertising?

17 A. You mean, tobacco or otherwise?

18 Q. Tobacco.

19 A. Market segmentation? Unless it were youth,
20 other than the youth segmentation, I can't think of any.
21 You know, I can think of a legal theory under which it
22 could be, you know, a deception by omission argument, if
23 you targeted a group that had a particular disability, and
24 you targeted them without disclosing what your product's
25 harm was to their particular disability, but that was not

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1 true, at least when I was there, vis-a-vis any of the
2 market segments.

3 I think the closest we came to looking at
4 something like that was an ad that appeared to be using a
5 pregnant woman. We probably had that panned on copy
6 testing, would have brought at least -- would have sent,
7 at least a letter, even though, again, a legal theory
8 would have been difficult.

9 Q. And was that a Brown & Williamson ad?

10 A. I don't think so, no.

11 Q. American?

12 A. What menthol cigarettes did American make?

13 Q. Riviera.

14 A. It was not a Riviera. I think it was Lorillard,
15 truthfully. It was in the press a lot at that time.

16 Q. Are you aware that African-Americans seem to
17 prefer menthol cigarettes in a disproportionate high
18 percentage compared to other ethnic groups?

19 A. I think usage patterns indicate that menthol
20 cigarettes are -- a greater percentage of
21 African-Americans smoke menthol.

22 Q. In light of that, does the Federal Trade
23 Commission have any problem with cigarette companies
24 advertising menthol products heavily in publications
25 directed to African-Americans such as African-American

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1 newspapers and Ebony magazine and Jet magazine?

2 A. I can only speak up to 1994.

3 Q. And?

4 A. Up to 1994, they had no problem with that. They
5 might have had a problem, again, if it were a magazine
6 with a disproportionate number of youth.

7 Q. Have you formed an opinion as to whether use of
8 menthol cigarettes is proportionately high in the
9 African-American community because of advertising?

10 A. I haven't thought about it.

11 Q. Okay. I want to ask you just a few questions
12 about the NCI editorial that you coauthored with Jack
13 Henningfield and others.

14 A. What number was that?

15 MR. YARBER: 104.
16 THE DEPONENT: A lot of dead trees.
17 BY MR. HOFFMANN:
18 Q. Do you have 104 in front of you?
19 A. I do.
20 Q. Okay. The first sentence says, "The study by
21 Djordjevic, et al. in this issue of the Journal elegantly
22 demonstrates that the Federal Trade Commission, FTC,
23 method of testing cigarettes for tar and nicotine provides
24 tobacco companies the opportunity to mislead their
25 customers."
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1 Now, that was known at least ten years ago,
2 wasn't it?
3 A. Yeah.
4 Q. In fact, it was known 20 years ago, wasn't it?
5 A. Twenty years ago?
6 Q. 1980.
7 A. By whom? It was -- some people might have known
8 it.
9 Q. Okay. People in the public --
10 A. I don't think the Federal Trade Commission knew
11 it.
12 Q. People in the public health community?
13 A. Some people active in the public health
14 community knew it; others didn't.
15 Q. Lynn Kozlowski knew it, didn't he?
16 A. I think Lynn Kozlowski was beginning to know
17 that.
18 Q. The next sentence says, "The study provides
19 fresh insights as to the means by which human biology and
20 tobacco engineering interact to cause the problem." What
21 "fresh insights" does that article provide?
22 A. Okay. Well, you'd be better off by asking those
23 questions of any of my co-authors, because as I said
24 yesterday, the parts of this article that I am most
25 responsible for are the policy parts and the parts that
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1 dealt with advertising.
2 So as far as the scientific insights as to what
3 might be new and what might not be new, I would defer to
4 them.
5 Q. Okay. That's fair. The next sentence says,
6 "The article reveals that smokers adjust a variety of
7 their smoking behaviors, such as puff frequency, depth of
8 inhalation, and ventilation hole blocking, thereby
9 ingesting high levels of nicotine and tar irrespective of
10 the advertised yields of the cigarettes."
11 Now, that was known ten years ago, wasn't it?
12 A. Certainly that all of those had an effect; you
13 know, with time, more is learned about each of those.
14 Q. And, in fact, 20 years ago, at least some
15 researchers knew that to be true, didn't they?
16 A. You know, I don't know about the depth of
17 inhalation. Again, that's an area that I, at least, only
18 knew about, you know, recently.
19 Q. All right. Then with that exception,
20 researchers, 20 years ago, knew that smokers adjusted
21 their smoking behavior in the ways listed in that
22 sentence, correct?
23 A. Yes, some did.

24 Q. Now, the last sentence of the first paragraph
25 says, "It is highly unlikely that the small differences in
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1 tar and nicotine deliveries found across brands have any
2 toxicologic significance." That sentence is outside your
3 area of expertise, isn't it?

4 A. Correct.

5 Q. On the top of the right-hand column, it says,
6 "As a consequence of human biology, the business interests
7 of the tobacco industry, and a nearly complete absence of
8 accountability by the industry, the FTC's intentions were
9 undermined."

10 Now, in fact, the FTC, at least 15 years ago,
11 was aware that its intentions might be undermined --
12 might be being undermined if indeed they were, wasn't it?

13 A. Correct.

14 Q. Toward the end of the first column there,
15 actually the last paragraph, it says, "Tobacco companies
16 do not provide their customers with guidance that could
17 help them avoid compensatory smoking, in other words,
18 avoiding taking extra puffs, deeper inhalations, covering
19 ventilation holes, smoking down to the filter, and smoking
20 more cigarettes."

21 The FTC doesn't provide consumers of tobacco
22 products this information either, does it?

23 A. Correct. And, you know, in more recent -- in
24 more recent publications of their tar and nicotine
25 reports, they may, in fact, be giving some of this, I

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1 don't know if they'd call it information, but they may
2 have detailed this in some of their reports.

3 So I can't tell out you for a fact that they
4 don't have this information available in some form,
5 certainly not in the kind of form that the industry could
6 provide for customers.

7 They also -- well, I know they proposed book
8 marks with this information. I don't know whether they
9 did it or not. So they may have actually done it. Again,
10 that would have been after I left.

11 Q. Now, the Djordjevic study isn't a switching
12 study, is it; it's not a study of smokers who have
13 switched from a higher-delivery product to a
14 lower-delivery product, is it?

15 A. I would have to go back to see. I know that
16 they studied a group of people in a laboratory setting.

17 Q. Okay.

18 A. But I don't think -- well, I don't want to
19 comment on whether it's a switching study or not.

20 Q. Okay.

21 A. I think people smoked their regular cigarettes,
22 but I can't be positive.

23 Q. And the Djordjevic study compares
24 medium-delivery products and lower-delivery products,
25 correct?

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1 A. Correct.

2 Q. It doesn't compare higher-delivery products with
3 lower-delivery products, right?

4 A. I think it was just medium and low that they
5 reported on.

6 COURT REPORTER: I'm sorry; I didn't
7 hear.

8 THE DEPONENT: It was just medium and low
9 that they reported on.

10 BY MR. HOFFMANN:

11 Q. And the Djordjevic study isn't the first time
12 that a study showed that smokers are able to manipulate
13 the way they smoke to receive more from low-tar cigarettes
14 than from high-tar cigarettes, as one would expect them
15 with the FTC methodology, is it?

16 A. No, but I think it's one of the first to do the
17 public testing, the model and then the testing of the
18 individual types of compensatory behavior.

19 Q. Now, you have earlier produced some documents
20 that you rely on in support of your opinions in this case,
21 and what I want to ask you about is the process that you
22 went through in selecting these documents. I take it you
23 got some documents from the Ness, Motley firm, correct?

24 A. Correct.

25 Q. And you got some documents from John Slade; is
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that correct?

2 A. John Slade had given a presentation to the
3 Institute of Medicine. And in that presentation, he
4 describes some information he had gotten from industry
5 documents, and I sent him an e-mail, and said I'd be
6 interested in seeing those documents. He referred me to
7 the Stan Glance book.

8 MR. HOFFMANN: Okay. Let's go ahead and
9 mark this as an exhibit then.

10 (DFT. EXH. 126, 3/5/00 Memo From John
11 Slack to Judith Wilkenfield, was marked
12 for identification.)

13 BY MR. HOFFMANN:

14 Q. Is Exhibit 126, your correspondence from John A.
15 Slade, referring you to the book, The Cigarette Papers by
16 Glance and others?

17 A. Yes, this looks like his note. Yes, I think
18 it's the whole thing.

19 Q. And did you, in fact, obtain copies of the
20 documents referred to in the Glance book?

21 A. I think I got the Glance book. I'm not -- did I
22 provide you with copies of the documents?

23 Q. Well, I'm asking -- I'm just asking you did you
24 obtain the documents referenced in the Glance book?

25 A. The documents themselves, no.

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1 Q. And I take it, as an expert, you wouldn't rely
2 on a secondary source, such as the Glance book, without
3 reading the underlying documents, would you?

4 A. I would, in my work in the government, I would
5 have relied on the careful researchers such as -- I think
6 the coauthor is Slade, and I would rely on his correctly
7 citing from a document.

8 Q. And you don't feel like you need to -- when he
9 cites and quotes from the document, you don't need to --
10 feel like you need to see the entire document to see the
11 quote in context?

12 A. I would prefer to see the entire document.

13 Q. Do you consider Stanton Glance to be a
14 disinterested researcher in the tobacco and health area?

15 A. No, I would consider John Slade to be.
16 Q. Be you don't consider Stanton Glance to be, do
17 you?
18 A. Stanton Glance does really careful research with
19 elegant studies, and he makes outrageous public
20 statements.
21 Q. For example, are you aware of the fact that
22 Stanton Glance has referred to lawyers who represent
23 tobacco companies as cockroaches?
24 A. Well, that would be irresponsible.
25 Q. Thank you.

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1 A. He's also referred to people in the public
2 health community, not much higher than cockroaches, so he
3 doesn't have a high opinion of too many people.
4 On the other hand, his research is usually
5 correctly done and is not inflammatory the way his
6 statements are.

7 (DFT. EXH. 127, Reliance Doc/Pebbles,
8 was marked for identification.)

BY MR. HOFFMANN:

10 Q. Let me show you what's been marked as
11 Defendant's Exhibit 127. I believe that was produced as
12 part of your reliance documents. And if I can direct your
13 attention to a couple of -- and I will represent to you
14 that this is a public statement made by Ernst Pebbles who
15 at the time was in-house counsel for Brown & Williamson;
16 do you know Mr. Pebbles, by the way?

17 A. Yes.
18 Q. And the document refers to -- in the first
19 paragraph, it says, "Inherent limitations of the FTC
20 cigarette testing program and borderline low-tar
21 advertising practices resulting from the way the test
22 results are reported have contributed to substantial
23 consumer confusion and misunderstanding. This situation
24 threatens to erode public confidence in both the FTC's
25 test reports and the industry's advertising claims.

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1 However, both the tests and the advertising disclosure of
2 the test results are important elements of a program to
3 encourage the development and promotion of low-tar
4 cigarettes.

5 Therefore, steps are to be taken now to make
6 those changes in the way the testing and advertising
7 program is carried out which, will preserve its integrity
8 and effectiveness and show our public confidence in it."

9 In your view, was that a reasonable position for
10 Mr. Pebbles to take in 1982?

11 A. Yeah, I wish he had followed through.
12 Q. So the answer is yes and you wish he had
13 followed through?

14 A. (Moves head up and down.)
15 Q. Okay.

16 A. I probably mean something different than he
17 means when he says those words. I think the advertising
18 program should be abandoned and the testing should be
19 abolished. He apparently agreed that the testing
20 certainly should be abolished; I think that was the
21 position the company took a year later, or probably in '82
22 as well.

23 Q. Okay. Let me -- one other question, I think

24 just one other. Have you reviewed the Brown & Williamson
25 web site on the topic of compensation?

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1 A. You know, I think I have reviewed -- that's --
2 Brown & Williamson web site is the one with the city --
3 the town, right?

4 Q. Yes.

5 A. I think I've read everything at one time or
6 another that was on that web site, not recently however.
7 When it first went up, I looked at it.

8 Q. As we sit here today, do you have an opinion as
9 to reasonableness of the position Brown & Williamson takes
10 on the topic of compensation as set forth on its web site?

11 A. You know, I'd have to look at it.

12 Q. Okay. So the answer is no, you don't have
13 opinion as we sit here today?

14 A. I cannot form an opinion without looking at it
15 again.

16 MR. HOFFMANN: Those are all the
17 questions I have.

18 MS. PARKER: Do you want to break so you can
19 move down here?

20 THE VIDEOGRAPHER: Off the record at 2:37.

21 (A recess transpired.)

22 THE VIDEOGRAPHER: Back on the record at
23 2:45.

24 EXAMINATION

25 BY MS. PARKER:

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1 Q. Ms. Wilkenfeld, yesterday afternoon, right
2 before we took a break for the end of the day, we were
3 going over the three documents from Reynolds that you said
4 you're relying on in this case, and those have been marked
5 as Exhibit 59, 60 and 61; do you have those in front of
6 you, again?

7 A. Yes. I think these were the documents that Mr.
8 Williams took out of my stack of papers which he felt were
9 relevant to Reynolds.

10 Q. Well, are there any documents that you're
11 relying on that are Reynolds documents, other than those
12 three?

13 A. I don't think so, but I don't think I was the
14 one who selected them. I think I went through --

15 Q. Well, if there are any other documents of
16 Reynolds that you're relying on, I need to know that.

17 A. I think in that stack of documents I went
18 through, these were the ones that had Reynolds'
19 designations on them.

20 Q. Are there any other documents that you're
21 relying on of Reynolds?

22 A. Are there any other documents of Reynolds that
23 I'm relying on?

24 Q. Because I believe you had testified before that
25 these were the three documents that you had selected that

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1 were Reynolds' documents that you were relying on?

2 A. And I thought that Mr. Williams asked me go
3 through and pick out those ones that had Reynolds'
4 designations on them, and that's what I did at that time,
5 but I don't know if I was asked if these were the only

6 documents that might be associated with Reynolds that I
7 had.

8 Q. Just to be crystal clear --

9 A. Yeah.

10 Q. -- if there are any documents of Reynolds that
11 you're relying on in this case, other than Exhibit 59, 60
12 and 61, I need to know that.

13 A. Well, you know, there are all the documents that
14 Reynolds submitted to the commission that -- related to
15 the Barclay matter that are not here.

16 Q. Are you relying on those documents?

17 A. In general? Well, I was asked to bring
18 everything that I had reviewed, and those are documents I
19 reviewed. So is that reliance? I don't know.

20 Q. Are there any other documents?

21 A. There is everything that was produced by the
22 Federal Trade Commission that Reynolds authored and sent
23 to the commission.

24 Q. And that was on the topic of Barclay?

25 A. Yes, and compensatory smoking, I presume.

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1 Q. Any other Reynolds' documents you're relying on,
2 besides the Reynolds' submissions to the FTC about
3 Barclay, and then these three documents that have been
4 marked as Exhibit 59, 60, and 61?

5 A. Right. With the caveat that if a document comes
6 across my desk in the course of my business that refers to
7 Reynolds, I will look at it, and I might rely on it. But
8 at this point, these are the ones that I have, yes.

9 Q. So at this point, you're relying on Exhibit 59,
10 60, 61, plus the Reynolds' submissions to the FTC about
11 the Barclay matter back in the early-1980s; is that right?

12 A. Correct. I think in Monograph 7, there are
13 statements by Reynolds' employees, so those would have
14 formed the basis of part of my decisions.

15 Q. So statements that are in Monograph 7?

16 A. Uh-huh.

17 Q. Anything else, from Reynolds?

18 A. From Reynolds? To the best of my knowledge, no.

19 Q. Well, we talked about Exhibit 59 yesterday, and
20 we began talking about Exhibit 60. My question is, is
21 there anything else about Exhibit 60 that you are relying
22 on, other than what you told me yesterday afternoon?

23 A. No. The document clearly shows that Reynolds
24 was doing testing in the area of smoking and health, that
25 the government was not aware, at that time, what was being

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1 done by Reynolds, that information -- that the company had
2 information about the relative mutagenicity of some of the
3 low-tar products, which was information that the
4 government did not know that Reynolds had.

5 And that, from what I can tell, you know, I
6 don't know what responses the company made with response
7 to these documents, but I know that they did not talk with
8 the Federal Trade Commission about any of these findings
9 when asked questions about what to do about the
10 commission's testing procedure.

11 Q. Are you referring to the request for public
12 comments --

13 A. Yes.

14 Q. -- that we've talked about previously?

15 A. The request for public comments, and also when
16 we talked -- request for public comments in '83, '84, the
17 request for participation in the 1994 NCI panel, during
18 those periods, yes.

19 Q. All right. Now, let me go to Exhibit 61, and
20 let me just state, for the record, Exhibit 61 is one of
21 the documents that's referred to as a Bliley document, and
22 we have a ruling in this case that allows the Plaintiffs
23 to use this document, but I just want to state, for the
24 record, that Reynolds still maintains that this document
25 is privileged, and we're not using the document ourselves.

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1 All I want to do is ask you a few questions
2 about it, because you have advised us that this is one of
3 the documents you are going to rely on.

4 A. Okay. I want to make a statement, too, which is
5 that when I asked for documents, I asked and they checked
6 that the documents -- that I could see the documents. I
7 did not want to be in possession of documents that I was
8 not allowed to be, so...

9 Q. What is it about 61 that you are relying on?

10 A. I want to make it clear, is -- am I in correct
11 possession of this document, or are you saying that it's
12 okay, that this document can be used in this matter?

13 Q. The judge has ruled in this case that the
14 Plaintiffs can use this document --

15 A. Okay.

16 Q. -- but our position is that this document is, in
17 fact, still privileged, and we are not waiving that
18 privilege.

19 A. Okay. I have not shown this to anyone else, and
20 my sole use of it has been for this proceeding.

21 Q. Thank you. Can you tell me what about this
22 document you're relying on for your expert testimony here?

23 A. I just found this a very interesting discussion
24 of the working -- of some of the workings within the
25 company, and the thought processes that were going on in

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1 the -- around 1983, about several issues that are relevant
2 to this case.

3 Q. Is this a document that was provided to you by
4 the Plaintiff's counsel?

5 A. Yes.

6 Q. Okay. Did they tell you why they were giving
7 you the document?

8 A. I asked them for a collection of documents that
9 might have to do with smoking and health or low-tar
10 products.

11 Q. Is there anything in this document, that you're
12 aware of, that relates to low-tar, low-nicotine products?

13 A. Yes. But if you ask me all of the things that I
14 found interesting is the discussion, and apparently it's a
15 discussion by the writer about a fellow employee who has
16 some concerns about the products, consequences of using
17 this product." I told Bob DiMarco that FA believes that
18 smoking is killing a couple hundred thousand people a year
19 and that his job is to cut that figure down to only 50,000
20 or so --

21 COURT REPORTER: Could you please slow
22 down?

23 THE DEPONENT: I'm sorry. "BD seemed

24 confused, asking, doesn't this man work for us?
25 Explained that he works for the Verband and that
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2 because of R.J.R Germany's share of market. It
3 did not have enough clout to remedy this
situation.
4 On page 3, "First, he said that the
5 conclusion called for more research but not the
6 kind of research that he wanted to do, i.e.,
7 research aimed at reducing the risks associated
8 with smoking. I told BD that if by risks of
9 smoking he meant research directed as a safer or
10 less hazardous cigarette, neither the company, nor
11 the industry, to my knowledge, has done such
12 research.

13 I explained that to date the company has
14 been concerned that a research effort aimed at
15 producing a safer cigarette would be viewed as an
16 admission that current or old products were
17 dangerous."

18 Page 9, "The discussion then turned to tar
19 and nicotine. BD began by emphasizing that
20 smokers perceive low tar and nicotine cigarettes
21 to be safer and said that he wanted to market
22 products that smokers perceived as being safer.
23 According to BD, if R.J.R. could come up with a
24 product which would be perceived as safer, it
25 would be a clear winner in the marketplace."

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1 Next page, "I told BD that in the current
2 state of knowledge no one really knew whether or
3 not any cigarettes caused chronic disease.
4 Moreover, no one had ever shown" -- that they
5 cause -- cigarettes have any health -- different
6 health consequences than high-tar cigarettes, a
7 view remarkably similar to Brown & Williamson at
8 that time, but not one that the company shared
9 with the Federal Trade Commission.

10 "I explained that there are ways of
11 dealing with tar and nicotine in the
12 straightforward manner. I outlined a program for
13 marketing low tar and nicotine products which
14 would entail speaking, something, telling people
15 our views, the views of Wynder, Gori and others,
16 as outlined by EJJ and I to Sam Witt and others."
17 I don't actually remember seeing those
18 ads.

19 "The subject then turned to the other
20 research which BD thought vital to the company,
21 i.e., reducing the risks of smoking" -- that whole
22 paragraph, I don't think I need to read it. This
23 has to do with aflatoxins, something that actually
24 now has become of interest to tobacco control
25 researches, because it is believed that aflatoxins

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1 may, in fact, be part of the problem associated
2 with smoking.

3 It's interesting that in '83 the company
4 knew about that, but it was not something that was
5 made known to either its consumers or the

6 government.

7 I told -- at page 12, "I told BD that I
8 had no problem with getting aflatoxins out of
9 tobacco, provided this did not result in an ad or
10 marketing campaign. BD said he had no such
11 intention. But he did not want to look at
12 mutagens in smoke and try to reduce them" -- but
13 he did want to look at mutagens and smoke."

14 He said that it was his responsibility,
15 and he would do this whether or not customers were
16 told this specific, et cetera...

17 And finally, on page 15, BD said that "he
18 intended to use animals in his new research and
19 that he had understood that there was an informal
20 agreement that R.J.R. would not do animal
21 research." He said that -- word I can't read --
22 as far as he was concerned, he recognized no such
23 agreement."

24 "I told BD that I understood that at one
25 point R.J.R. started doing animal research and

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1 abandoned it. I then told BD about Wynder's mouse
2 painting experiments and how these were replicated
3 by A.D. Little to the chagrin and embarrassment of
4 R.J.R. and other cigarette manufacturers. I said
5 that if a company wanted to have animals to paint
6 their skins with tobacco smoke condensate, I would
7 have problems with it, but that if the company
8 wanted animals to do CNS research, I would not."

9 So I thought it was an interesting document,
10 showing the mind-set of at least one person in the
11 company, about the health hazards of smoking and
12 about the benefits of any tar and nicotine, lower
13 products.

14 BY MS. PARKER:

15 Q. Let me ask you this, just as a general matter.
16 When the FTC issues, in the Federal Register, a request
17 for public comments, is there any requirement that a
18 particular individual or a particular company provide
19 those comments?

20 A. Absolutely not.

21 Q. All right. Are you qualified as an expert on
22 the issue of where vent holes should be located on
23 cigarettes?

24 A. No.

25 Q. Are you qualified as an expert on the issue of
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1 the size of the vent holes?

2 A. No.

3 Q. Are you qualified as an expert on the issue of
4 whether or not vent holes should be visible to the smoker?

5 A. I'm not sure you need to be an expert on that.

6 Q. Well, I'm asking you if you --

7 A. I certainly have a strong opinion about -- from
8 the consumer marketing perspective that would be based
9 upon my experiences at the Federal Trade Commission. So
10 if that makes me an expert --

11 Q. Have you studied the issue?

12 A. Of whether holes should or should not be
13 visible?

14 Q. Correct.

15 A. I've done a lot of reading on the issue,
16 certainly made recommendations to the commission about it.

17 Q. Do you consider yourself qualified as an expert
18 on the issue of whether or not vent holes should be
19 visible to the smoker?

20 A. On that question, alone, yeah, I think so.

21 Q. Do you consider yourself qualified as an expert
22 on the issue of the factors that affect the effectiveness
23 of the vent holes in cigarettes?

24 A. Factors that affect the effectiveness? No.

25 Q. Are you qualified as an expert on the issue of
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1 mutagenicity, how cigarette smoke condensates?

2 A. No.

3 Q. I just want to make sure I'm clear about this.

4 Now, you, yourself, requested some public
5 documents from the FTC, correct?

6 A. No -- oh, yes.

7 Q. In this lawsuit?

8 A. Yes.

9 Q. Okay. And those were documents that you brought
10 with you on the very first day of your deposition that was
11 held in Washington, correct?

12 A. Some of the documents that I brought were some
13 of the documents that were provided.

14 Q. So put a different way, all of the -- 100
15 percent, all of the documents that you received from the
16 FTC that you, personally, requested from the FTC were
17 included in the set of documents you brought with you on
18 that first day, correct?

19 A. I have to ask -- when I went down to the FTC and
20 said I want to look and see what's publicly available, I
21 think that those documents were provided to you pursuant
22 to your FOIA request --

23 MR. PATRICK: Right.

24 THE DEPONENT: -- even though I had gone and
25 helped them select from their public documents

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1 which ones might be useful. So the documents that
2 were provided were provided, I think, pursuant to
3 the FOIA request. But, yes, I provided them to
4 you. Anything that they got that I got from FTC,
5 I provided them.

6 BY MS. PARKER:

7 Q. Let me show you what we are marking as the next
8 exhibit, which is Number 129.

9 (DFT. EXH. 128, 2/4/00 email from Jerry
10 Evans to Judith Wilkenfeld, was marked
11 for identification.)

12 (Off-the-record conference.)

13 MS. PARKER: 128; I'm sorry.

14 THE DEPONENT: Did he want this back?

15 MR. PATRICK: No, that is an exhibit that
16 will go to the court reporter.

17 THE DEPONENT: Okay.

18 BY MR. HOFFMANN:

19 Q. Let me show you these two documents, 128 and
20 129, which are part of the documents that you gave to us.
21 Those are two e-mails from the Ness, Motley law firm to
22 you, correct?

23 A. Uh-huh.

24 Q. And those e-mails just confirm the receipt of
25 the documents that we've been talking about that you
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1 received from the FTC --
2 A. Right.
3 Q. -- correct?
4 And now, in addition to the documents that you
5 received from the FTC, the Plaintiff's counsel here also
6 submitted this FOIA request, and they received some
7 additional documents, correct?
8 A. I don't know.
9 THE DEPONENT: Did you get anything in
10 addition from Brown & Williamson?
11 MR. PATRICK: This is concerning the American
12 Brands document.
13 BY MS. PARKER:
14 Q. The FOIA request in this case.
15 A. Okay. Yes, I got no -- I got -- personally got
16 no documents from FTC on American Brands.
17 Q. Did you get any documents from the FTC in this
18 case whatsoever?
19 A. Yes.
20 Q. Okay.
21 A. The Barclay documents.
22 Q. And those were the documents that you brought
23 with you to the first day of your deposition?
24 A. They were among the documents I brought.
25 Q. Okay. Now, in addition to those documents, what
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1 I'm asking now is, weren't there additional documents from
2 the FTC that came to you from the Plaintiff's counsel
3 through their FOIA request?
4 A. Yes.
5 Q. Okay. And let me show you now what we're going
6 to mark as Exhibit 130, and this is another e-mail from
7 Plaintiff's counsel to you, and then Exhibit 131 is a
8 fourth e-mail, again from the Plaintiff's counsel to you
9 discussing those FOIA documents, correct?
10 (DFT. EXH. 130, 2/17/00 email from Alex
11 Wagner to Judith Wilkenfeld, was marked
12 for identification.)
13 (DFT. EXH. 131, 2/28/00 email from Alex
14 Wagner to Judith Wilkenfeld, was marked
15 for identification.)
16 THE DEPONENT: Yes.
17 BY MS. PARKER:
18 Q. Let me show you now what we're marking as
19 Exhibit 132, and this is a file that you gave to us on the
20 first day of your deposition, that says Ness, Motley, is
21 that your handwriting on the first page there where it
22 says Ness, Motley?
23 A. It does not look like my handwriting.
24 (DFT. EXH. 132, Judith Wilkenfeld Time
25 Records, was marked for identification.)
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JUDITH WILKENFELD - 4/26/00 - BY MS. PARKER 1002
1 BY MR. HOFFMANN:
2 Q. Okay. All right. Well, if you will look on the
3 inside, it looks to me as though this folder is a summary
4 of the time that you spent on this case; is that right?
5 A. Uh-huh.

6 Q. And in handwriting there on the first page, it
7 says "FOIA, Bill Golden," and then has a phone number; do
8 you see that?

9 A. Correct.

10 Q. Who is Bill Golden?

11 A. Bill Golden is an attorney in the Office of the
12 General Counsel at the Federal Trade Commission. Although
13 not personally doing FOIA work, I don't think, at the
14 moment, when I was at the commission, he was a person I
15 would contact if I had questions about the scope of FOIA.

16 Q. Did you contact Mr. Golden in this case, in the
17 Little case?

18 A. I contacted Mr. Golden about a question I had on
19 FOIA that was related to this case, yes.

20 Q. Did you have any discussion with Mr. Golden
21 about the case, itself?

22 A. No.

23 Q. All right, now. If you'll look at the next
24 page, still in this folder that we've just marked --

25 A. I mean other than as it related to FOIA.

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1 Q. Okay. There's an agenda for meeting; do you see
2 that?

3 A. Yes.

4 Q. All right. Who prepared that agenda?

5 A. Ness, Motley.

6 Q. Who selected the topics to be discussed?

7 A. I presume they were selected by Ness, Motley
8 after conversations with me on the phone, but I can only
9 guess that that's how they selected them.

10 Q. Okay. Look at the entry for 1:30 in the
11 afternoon, it says, "How to present the FTC story in
12 trial."

13 A. Uh-huh.

14 Q. "Strategies for Little case"; do you see that?

15 A. I do.

16 Q. What was the substance of that discussion?

17 A. What was the substance? I know part of it was
18 whether I would be a witness; I remember that was brought
19 up, and I didn't want to be. So I know that a lot of the
20 discussion had to do with what were the -- what were the
21 federal -- what were the constraints on federal employees
22 having to do with talking about what went on at the
23 commission.

24 Q. What else was discussed? It looks like it's a
25 two-hour discussion.

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1 A. Oh, I doubt if we kept to this timetable. The
2 reason I'm blanking is because I don't remember discussing
3 too many strategies, if any.

4 I think the question -- the question -- I had
5 spent the day describing the FTC's tar and nicotine -- I
6 had brought materials, too, so we didn't necessarily keep
7 to this schedule.

8 I had brought down -- I think there were -- you
9 know, the -- what did I bring down -- materials, all
10 public materials about the FTC tar and nicotine testing
11 procedure. We spent a lot of time talking about that,
12 about the Barclay trial, about the 10-to-1 ad.

13 Like, for instance, it says before lunch that we
14 talked about the thought leaders and other ad campaigns,

15 we didn't do that, that I have any recollection.

16 So the fact that I'm blanking about the
17 strategies for the Little case is because I'm not quite
18 sure what discussions those would have been, other than
19 what my part could be in the case.

20 Q. If you'll look at the next page of that
21 document, it's a letter from you to Mr. Patrick dated
22 October 9th, 1999, in the middle of the letter it says "I
23 am checking with both the FDA and FTC about legal
24 constraints, if any, on testifying by an ex-government
25 official"?

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1 A. Correct.

2 Q. Do you see that?

3 A. Uh-huh.

4 Q. Okay. Are those the discussions that you've
5 already told us about previously that you had with --

6 A. Christian White.

7 Q. Yes.

8 A. And with Patricia Kaeding.

9 Q. Are those the discussions?

10 A. Those are the designated ethics offices.

11 Q. Okay. Let me show you Exhibit 133.

12 (DFT. EXH. 133, 10/11/99 email from
13 Patricia Kaeding to Judith Wilkenfeld,
14 was marked for identification.)

15 BY MR. HOFFMANN:

16 Q. Exhibit 133 is an e-mail from Patricia Kaeding
17 to you, dated October 11, 1999; correct?

18 A. Yeah.

19 Q. It looks like, from her e-mail address, that Ms.
20 Kaeding is at the FDA, correct?

21 A. Correct.

22 Q. Okay. Who is she?

23 A. She is with the general counsel's office there.
24 She is probably not the designated ethics person, but she
25 was one of the attorneys who worked with us on the tobacco

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1 rule, and therefore would have been the correct -- when I
2 called over to FDA and said who should I talk to about
3 this, everybody said talk to Patty.

4 Patty obviously went and talked to somebody
5 named Tim White who would have, probably, had more
6 knowledge about ethics.

7 Q. Who is Tim White?

8 A. I don't know.

9 Q. Okay. Did Ms. Kaeding ever get back to you
10 about your involvement in this case?

11 A. She did.

12 Q. And what did she tell you?

13 A. She said it was okay. I actually cross-examined
14 her about that.

15 Q. All right. Now, you also produced, on the first
16 day of your deposition, some other e-mail correspondence
17 between you and the Plaintiff's lawyers here. I want to
18 ask you about some of those.

19 (DFT. EXH. 134, 2/24/00 email from Alex
20 Wagner to Judith Wilkenfeld, was marked
21 for identification.)

22 BY MR. HOFFMANN:

23 Q. The first one is Exhibit 134, and this is an

24 e-mail dated February 24th of this year, the year 2000,
25 and it's an e-mail from Alex Wagner at the Plaintiff's law
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JUDITH WILKENFELD - 4/26/00 - BY MS. PARKER 1007
1 firm to you about the Minnesota Court of Appeals decision?

2 A. Correct.

3 Q. Okay. Do you have any idea why she sent you
4 this information?

5 A. Yes.

6 Q. Why?

7 A. Because as I indicated, I didn't want to have in
8 my possession or on my reliance any documents that I was
9 not entitled to have, legally. And so I queried her to
10 make sure that everything I had, I could legally have.

11 I take responsibilities very seriously about
12 protective court orders, and I didn't want anything that
13 could not be seen by me or could not be used by me. And
14 if there were limitations, I wanted to know what those
15 limitations were.

16 Q. All right. I want to ask you now to look at
17 Exhibit 1 in your deposition. It was the very first -- it
18 was your CV.

19 A. Okay.

20 Q. Do you have that?

21 A. Yes.

22 Q. If you'll look at page 2 of your CV, there's a
23 bullet point there, right below the middle of the page
24 that begins, "Led effort to modify"; do you see that?

25 A. Uh-huh, yes.

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1 Q. Okay. It says, "Led effort to modify the FTC's
2 methodology for testing the tar and nicotine in
3 cigarettes, including the coordination of efforts by
4 non-governmental organizations, Congress members and other
5 Federal agencies to influence FTC action"; is that
6 correct?

7 A. Yes.

8 Q. Okay. Was this coordination of efforts some
9 type of formal effort, formal organization?

10 A. What a poor choice of words.

11 Q. I'm sorry; what did you say?

12 A. I said what a poor choice of words. I know what
13 I meant there, was that at various times during -- from
14 1983 on, we would have various different efforts, either
15 from outside or inside, to modify the testing procedure.
16 In '83, it was the Federal Register notice. Following the
17 '83, there was the Federal Register notice, also, to deal
18 with Barclay.

19 I worked with the ISO and the U.S. standards
20 group that was representative to ISO about the Karesta
21 (ph) method and what, if we modified -- if we modified the
22 FTC method, what would who would that do to the Karesta
23 method.

24 Q. So does this part of your resume refer to work
25 that you did while you were a staff member of the FTC?

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1 A. Yes.

2 Q. Okay. What non-governmental organizations did
3 you work with?

4 A. The non-governmental organizations that would
5 have come to the commission, would have been those from

6 the public health community, such as Coalition on Smoking
7 or Health, heart, lung and cancer, but also the standard
8 organizations, ISO and -- what is the U.S. one called?
9 Whatever the U.S. one is called that is representative to
10 the ISO.

11 At one point, I also worked with other
12 government agencies trying to find another home for the
13 testing procedure.

14 Q. What other governmental agencies did you work
15 with?

16 A. Well, first, we tried to sell the procedure
17 to -- we tried to sell it to the Bureau of Alcohol,
18 Tobacco and Firearms, we tried to sell it to the Food and
19 Drug Administration, we tried -- I think we might have
20 even tried -- who else did we try? I think we tried
21 everybody who had even the remotest interest in tobacco to
22 see if we could transfer the lab to them. National --
23 probably talked even to the National Bureau of Standards.
24 I don't remember what --

25 Q. What members of Congress did you talk to?

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1 A. Everybody was interested, I'm sure. Well, in
2 the case of formal testimony, the -- I worked with the
3 staff of Congressman Luken, during his period of great
4 upsetness with the commission about abandoning the
5 procedure. I'm sure discussions were held on and off with
6 Congressman Waxman's staff. I don't know whether I had
7 conversations with Congressman Dingle's (ph) staff about
8 this or not. Those would be the main ones.

9 Q. Okay. Do you believe that your testimony that
10 you're going to give in this case will relate to subjects
11 that you participated in, personally and substantially,
12 while you were at the government?

13 A. In part, yes.

14 (DFT. EXH. 135, District of Columbia
15 Rules of Professional Conduct, Rule
16 1.11, was marked for identification.)

17 BY MS. PARKER:

18 Q. I'm going to show you what we've marked as
19 Exhibit 135, then. That's the District of Columbia
20 Professional Conduct Rule 1.11; have you seen that before
21 today?

22 A. No, I can't say that I have.

23 Q. Okay. Well, if you look at Rule 1.11,
24 subsection A, like apple, it says, "A lawyer shall not
25 accept other employment in connection with a matter which

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1 is the same as or substantially related to a matter in
2 which the lawyer participated personally and substantially
3 as a public officer or employee."

4 And the comment there notes that there's no
5 provision for waiver. Have you considered whether your
6 testimony in this litigation violates --

7 A. I have indeed.

8 Q. -- that rule?

9 You have?

10 A. And it doesn't.

11 Q. How did you reach that conclusion?

12 A. This is the very same rule that the government
13 operates under, as a matter of fact, it's probably word
14 for word. I went to the government agencies and asked

15 them if I would be in violation of these provisions if I
16 gave testimony on matters that were now public, and they
17 said there was no problem whatsoever.

18 So on the advice of counsel from the two
19 agencies of which I worked, I do not feel I'm in violation
20 of that.

21 Q. Have you had any discussions with the
22 Plaintiff's lawyers here, the Ness, Motley firm, about
23 whether or not your testimony in this litigation would
24 violate any of those rules?

25 A. To be truthful, as a government employee, I
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1 would rather -- I didn't, because I would rather rely on
2 the agencies that I worked for. It is their
3 responsibility to ensure that their employees not violate
4 the law.

5 Q. Did you check with anybody from the D.C. bar to
6 ask them their views on whether or not your testimony here
7 would violate --

8 A. No.

9 Q. -- that rule?

10 A. Nor.

11 Q. You did not. Okay.

12 MS. PARKER: I have no further
13 questions.

14 MR. HOFFMANN: Let me ask one question, if I
15 may.

16 EXAMINATION

17 BY MR. HOFFMANN:

18 Q. Following up on that last line of questioning,
19 have you engaged in any inquiries as to whether your
20 consulting with the Ness, Motley firm on strategic issues
21 relating to the trial of this case would violate those
22 ethics rules?

23 MR. PATRICK: Let me object. Although
24 the word "strategies" was in the agenda, I would
25 strenuously object that she participated in such a

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JUDITH WILKENFELD - 4/26/00 - BY MR. HOFFMAN 1013
1 discussion, but she can answer, she was there.

2 THE DEPONENT: And as you -- as I indicated
3 when she asked me about that, I said I really had
4 a hard time coming up with what that discussion
5 could have been, other than whether I would be a
6 witness.

7 I did not offer them any legal advice
8 when --

9 BY MR. HOFFMANN:

10 Q. Well, let us answer my question first, and then
11 you can --

12 A. Okay. And that was --

13 Q. Did you consult with any of these people you're
14 talking about, as to whether consulting with the Ness,
15 Motley firm on trial strategy in this case would violate
16 your ethical obligations under the rules?

17 A. No, I have no intention of engaging in
18 discussions of trial strategy.

19 Q. Okay. And so, then, let me ask the following
20 question. Have you, in fact, discussed with the Ness,
21 Motley firm strategy for the trial of the Little case?

22 A. Depending upon what they mean, not that I -- as
23 I understand it, other than whether -- I actually have

24 said, on several occasions, that I didn't think I should
25 be a witness, but that's -- you know, the only strategy
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1 other than that, no.

2 I was contacted initially as an employee of the
3 Federal -- as an ex-employee of the Federal Trade
4 Commission to discuss matters about the commission's
5 procedures.

6 In my discussions with them on that day and at
7 their firm, nothing I disclosed would I not have disclosed
8 had I been still a member of the Federal Trade Commission.
9 And I routinely had those kinds of discussions with law
10 firms on both Plaintiff's and the tobacco industry side.
11 This was not information that was not available for
12 anybody who picked up the phone and called me when I was
13 in the government or when I was not in the government.

14 MR. HOFFMANN: Okay. That's all I have.

15 MS. PARKER: Thank you.

16 THE VIDEOGRAPHER: Off the record and
17 conclusion at approximately 3:20.

18 (The deposition concluded at 3:20 p.m.)

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25 MADONNA M. FARRELL, RPR - STENOTYPE REPORTING SERVICE
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1 CERTIFICATE OF REPORTER

2 I, Madonna M. Farrell, Registered
3 Professional Reporter and Notary Public in and for the
4 State of South Carolina do hereby certify that the
5 deponent, JUDITH P. WILKENFELD, was duly sworn by me to
6 testify to the truth, and that the above deposition, pages
7 3 through ^ , inclusive, was recorded stenographically by
8 me and transcribed through computer-aided transcription by
9 me to the best of my ability.

10 I FURTHER CERTIFY that the foregoing transcript
11 is a true and correct transcript of the testimony given by
12 the said witness at the time and place specified.

13 I FURTHER CERTIFY that I am neither attorney or
14 counsel for, nor related to or employed by any of the
15 parties to the action in which this deposition is taken,
16 or financially interested in this action.

17 IN WITNESS WHEREOF, I have set my hand and seal
18 this 17th day of May, 2000.

19

20 Madonna M. Farrell
21 Registered Professional Reporter
Notary Public
My Commission Expires
22 October 20, 2005
23
24
25

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1 VERIFICATION OF DEPONENT

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3

4 I, JUDITH P. WILKENFELD, have read the
5 foregoing deposition consisting of 194 pages which was
6 reported by Madonna M. Farrell, Registered Professional
7 Reporter and notary public in and for the State of South
8 Carolina on April 26, 2000.

9 I find the transcript of this deposition
10 to be a true and accurate transcript according to my
11 testimony on that date with the exception of
12 corrections as listed on the attached correction sheet,
13 which was filled in by me.

14

15

16 JUDITH P. WILKENFELD

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20 , 2000

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MADONNA M. FARRELL, RPR - STENOTYPE REPORTING SERVICE

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1 ERRATA PAGE

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3 PAGE # - LINE # CHANGE AND/OR CORRECTION
4 (AND EXPLANATION)

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THE ABOVE CHANGES WERE NOTED BY ME ON THIS ERRATA PAGE
BEFORE SIGNING THE ATTACHED VERIFICATION OF DEPONENT. I
HAVE RETAINED A COPY OF THIS ERRATA PAGE FOR MY RECORDS,
AND THE COURT REPORTER IS TO ATTACH THIS PAGE AND MY
VERIFICATION TO THE ORIGINAL TRANSCRIPT.

21

22

23

24 DATED:

25

JUDITH P. WILKENFELD

MADONNA M. FARRELL, RPR - STENOTYPE REPORTING SERVICE

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